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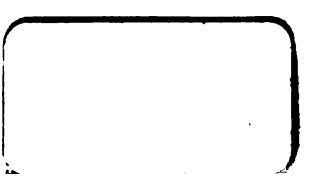

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By special request of the Judges, an effort has been made to give, in each syllabus and index paragraph, a reference by number to the analogous topic and section of the new 1919 Washington State Digest.

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IN THE

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OF

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JUDGES

OF THE

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ERRATA

Page 114, line 12 from top, for *Grosgean* read *Grosjean*

Page 264, first syllabus, line two, for *irrigation* read *drainage.*

Page 264, second syllabus, line four, for *irrigation* read *drainage.*

Page 620, first syllabus, first line, for *(11)* read *(39)*

CASES

DETERMINED IN THE

SUPREME COURT

OF

WASHINGTON

[No. 15173. Department One. May 12, 1919.]

J. D. BENNER, *Trustee in Bankruptcy etc., Respondent,* v. ORVILLE BILLINGS, *Appellant.*[1]

FRAUDS, STATUTE OF (27)—SALE OF GOODS—PART PAYMENT—CORPORATE STOCK—DEFERRED PAYMENTS BEYOND ONE YEAR. A contract for the sale of stock of a corporation upon which a partial payment is made is a sale of goods, wares, and merchandise, and is not void as within Rem. Code, § 5289, relating to oral contracts that are not to be performed within one year, although deferred payments extend beyond that time.

BANKRUPTCY (18) — DEBTS DUE BANKRUPT — DEFENSES — SUFFICIENCY OF ASSETS. In an action by a trustee in bankruptcy to recover the amount due to a bankrupt corporation on a sale of its treasury stock, the complaint need not show that the bankrupt did not have sufficient other property to pay its debts.

CORPORATIONS (107, 226)—STOCK—ACTIONS TO ENFORCE—LIABILITY —DEFENSES. In an action by a trustee in bankruptcy to recover the amount due on a sale of treasury stock, the objection that the complaint shows no tender of the stock before suit is not available where it is alleged that the stock was sold and delivered.

SAME (67, 208, 211)—STOCK—TRANSFERS — INSOLVENCY — PREFERENCES TO OFFICERS. Under the trust fund doctrine, an officer in control of a failing corporation cannot evade his liability for treasury stock which the corporate records show that he purchased by claiming that the apparent sale was only an option, nor can his liability be limited to the prejudice of creditors by any arrangement between himself and the corporation or by a transfer of the shares.

[1]Reported in 181 Pac. 19.

INTEREST (3)—COMPENSATION FOR USE. Where the amounts and dates of maturity of installments on a sale of treasury stock were fixed and certain, they draw interest at the rate of six per cent per annum upon maturity, under Rem. Code, § 6250.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered July 16, 1918, upon findings in favor of the plaintiff, in an action for the purchase price of stock. Affirmed.

Hayden, Langhorne & Metzger, for appellant.

Carkeek, McDonald, Harris & Coryell and *J. L. Snapp,* for respondent.

MITCHELL, J.—In October, 1917, this action was commenced in the superior court of Pierce county by J. D. Benner, as trustee in bankruptcy of the National Service Company, a corporation, against Orville Billings, to recover the balance due on the purchase price of certain donated paid-up treasury stock of the corporation. The complaint, in substance, alleged the incorporation of the National Service Company; that it was adjudged bankrupt on February 10, 1916, and plaintiff was appointed trustee in bankruptcy on May 17, 1916, and thereupon qualified as such trustee; that, on December 30, 1914, defendant and the National Service Company entered into an agreement wherein and whereby the company on that day sold and delivered to defendant 1,850 shares of its capital stock, then in its treasury, for which defendant then and there agreed to pay the sum of $15,900 in the following manner, to wit: $3,900 in cash, $12,000 in monthly installments of $1,000 each, the first of such installments to be paid February 1, 1915, and one thereof each month thereafter until all had been paid; that, in pursuance of said agreement, defendant paid the National Service Company on December 31, 1914,

$3,900 in cash; and that there is still due under said agreement the sum of $12,000 with interest.

To the complaint, the defendant demurred on the grounds that the court was without jurisdiction of the subject-matter; that it did not state sufficient facts to constitute a cause of action; and that the action was not commenced within the time limited by law. The demurrer being overruled, defendant filed an answer denying he purchased 1,850 shares of the stock, or any at all, claiming the transaction was only an option to purchase the stock on which he admitted he paid $3,900; denied owing $12,000, or any other sum; and affirmatively set out in considerable detail the history of the transaction upon which the suit is based, giving his version, explanation, and interpretation of, and alleging errors contained in, certain records concerning the transaction from and by which he claimed the deal was only an option to purchase, and not a purchase; and further alleged that he and his successors in interest had fully paid for the 1,850 shares of stock alleged to have been taken under an option agreement only; and that the alleged agreement for the purchase of 1,850 shares of stock, if ever made, was not enforceable because he signed no agreement, contract, note or memorandum thereof, in writing, as required by the statute of frauds, and that he relies on § 5289 of Rem. Code as a defense to the action. A reply of denials was filed to the affirmative portions of the answer. Upon trial to the court without a jury, there were findings, conclusions, and judgment entered in favor of plaintiff in the sum of $6,071.62, including interest. Defendant has appealed.

Upon the whole record, we find the controlling facts to be about as follows: Two persons, as partners, were engaged in an advertising scheme somewhat

similar to the "Green Trading Stamp" idea; and in September, 1914, they incorporated the business under the name of "The National Service Company." The capital stock of the company was paid for by transferring to it the partnership business, and the company assumed all the debts of the partnership. The company received into its treasury the gift of some of its stock to be sold for needed funds. Its principal place of business was in Tacoma, it was doing business in Portland and attempted to establish itself in Seattle. Appellant was solicited to purchase some of this donated paid-up stock. He became interested and did buy. After preliminary negotiations, the deal involved in this suit is best explained by the record made of it at the time. The minutes of a meeting of the trustees of the corporation held on December 30, 1914, at its office, after showing who were present and that the meeting was called to order, recite, among other things, the following:

"Upon motion duly made and seconded, Orville Billings was elected trustee, to serve out the unexpired term of Mr. Butt, and until his successor should be elected and qualify. *Mr. Billings having taken the trustee's oath, was admitted to the meeting.* . . . Mr. Billings made a verbal offer to the trustees to purchase 1,850 shares of the capital stock of this company, and to pay therefor the sum of $15,900, and to pay for the same in the following manner: $3,900 in cash, and the balance at the rate of $1,000 per month, the first payment to be made February 1, 1915. Upon motion duly made and seconded, it was resolved that the aforesaid offer be accepted, and that this company sell, out of the shares of stock held in the treasury of the company, 1,850 shares to Mr. Billings for the sum of $15,900, payable, $3,900 in cash, the balance at the rate of $1,000 per month, payments beginning February 1, 1915. The meeting thereupon proceeded to the election of a president and manager of the

company. Upon motion duly made and seconded, Orville Billings was elected president of the company."

It may be here mentioned appellant denies he was at the meeting; and of others present, some testify he was there, while others say they do not remember if he was.

It appears that appellant had already paid and been given credit for $1,000 on this sale, and on the next day, December 31, 1914, he paid and was given credit for $2,900. At the same time, he was charged up with $12,000 and the "stock in treasury" account credited with 1,850 shares. The minutes of the next meeting of the trustees, January 8, 1915, show, among other things:

"Present, the following-named trustees, Orville Billings, J. T. Gregory, James R. Thompson, Herbert E. Post. President Billings called the meeting to order. . . . *The minutes of the previous trustees' meeting of December 30, 1914, were read and approved.* . . . It being reported to the meeting that Mr. Billings had paid $3,900 on his stock subscription at this time, and that the certificates of the stock purchased by him should be deposited in some independent escrow, the following resolution was moved, seconded, and unanimously carried: Resolved that stock certificates Nos. 29, 30 and 31 of this company, for 1,060, 350, and 790 shares of stock, respectively, *made out in the name of Orville Billings,* be deposited in the Bank of California, N. A., of this city, in escrow, to be held by said bank and delivered over to Mr. Billings, or his order, upon payment of the sum of $12,000, and that a copy of this resolution be delivered to the said Bank of California, N. A., as its instructions herein."

The minutes of this meeting were signed by Orville Billings as president. The minutes of the annual stockholders' meeting of the corporation, January 11, 1915, show, among other things:

"The meeting was called to order by President Billings. . . . Upon roll call it was ascertained that the following stock was present and represented either in person or by proxy: Orville Billings, 2,200 shares." [Other names and number of shares.]

The meeting was adjourned until the next day, and the minutes were signed by Orville Billings, president. The minutes of the adjourned stockholders' meeting, January 12, 1915, show that Orville Billings as president called the meeting to order and represented 2,200 shares of stock. These minutes were signed by him as president. It appears that, about or soon after the purchase of the 1,850 shares, the appellant purchased, for $1,100, 350 other shares from a stockholder (which accounts for the total of 2,200 shares mentioned in the minutes), and later on, from time to time, made other purchases until he finally held 2,800 of the total 5,000 shares of the capital stock of the corporation. It appears that, soon after appellant took charge of affairs, there was an informal understanding he should receive twenty-five per cent of all net profits of the company (later at a trustees' meeting changed to $500 per month) for his services as president and manager, and provided also a change in his contract of purchase of stock from payments of $1,000 to payments of $500 per month. The company was, during all this time, involved and appellant advanced his personal funds to keep the company going, until, at a trustees' meeting, May 3, 1915, according to the minutes, appellant, who presided, mentioned therein as having purchased 2,200 shares of the capital stock, was given credit thereon in the sum of $2,768.81 on account of advancements made for the benefit of the company, and also $2,000 on account of salary earned since *January 1, 1915.* At this meeting, it was by reso-

lution provided that appellant having paid all but $5,231.19 for the 2,200 shares of stock purchased by him, it should be considered that he be relieved from the payment of the balance and excused from his agreement to purchase stock represented by that balance. These minutes further show that another trustee,

"expressed a desire to take charge of the active management of all the business of said company and relieve the said Orville Billings of the said work as president and general manager thereof, and offered to devote his time and services to the furthering of the business of the company at the salary which the company had been paying to Mr. Billings, if the company would transfer to him, or authorize Mr. Billings to do so, the shares of stock which had been bought by Mr. Billings but had not been paid for, and if they would accept him as a purchaser thereof and as a debtor therefor in the place of Mr. Billings;"

and that thereupon, by resolution, the offer and plan were adopted. The minutes of this meeting were signed by Orville Billings as president. This new manager, without financial responsibility, according to the testimony, never received any of the stock, and if he served as manager, it was for a short time only, after which he entered some private employment of appellant. Later on, this same stock of appellant's purchase, remaining unpaid for, was attempted to be put off on one Stearns, chosen as manager, with a large salary, but he failed to accomplish anything. Stearns was without means and practically unknown to all the officers of the company except appellant. Appellant is a man of large means and business ability. He controlled the affairs of the company after he became its president and manager. Friction arose between him and other officers, who resigned. As to

the condition of the company when he went in, he testified:

"I found there was considerable indebtedness. I found they owed the P. S. B. & T. Co. $1,100, and all the money I put in this deal went to pay debts. The $3,900 paid in went to pay debts. There was no question I was buncoed."

He explained his purchase of stock by saying, as he was going into it to work, he wanted to reap the benefits if he made it a winner. He testified:

"On February 20, 1915, when my salary was fixed at $500 and after I had paid in $3,900, there was still some $4,200 of indebtedness against the company. At that time the company didn't have very much assets, and I have never been able to find that they ever did have very much assets."

After the trustees' meeting of May 3, 1915, he never called to get the 1,531 shares the company found he had then paid for, as to which he said, "I didn't care much about them. I didn't figure they were worth anything." He said the manager who succeeded him never paid him anything for the remaining 679 shares. In fact, the stock was never delivered by him until he turned it over to Stearns, as to which he testified:

"Well, I rather considered it the same as a gift, because I had got to the point then where I could not see any point of the National Service Company making anything, and any transactions I made after that I would almost consider a gift, because I didn't think it was worth anything."

During appellant's management, about February 20, 1915, a number of officers who had given their personal notes for stock surrendered all claims to the stock in cancellation of their notes. About May 4, 1915, an action was commenced in the superior court of King county to have a receiver appointed for the

company. Successfully resisting such appointment, appellant made an affidavit setting up his contract of purchase of the stock and his agreement and ability to pay $1,000 per month therefor. This affidavit was made subsequent to the meeting of the trustees purporting to change his payments to $500 per month, and after the meeting attempting to release him altogether and to fasten his obligation upon the succeeding manager. On September 20, 1915, upon complaint of appellant, a receiver for the company was appointed by the superior court of Pierce county. Thereupon a petition in bankruptcy was filed in the United States district court and the company was adjudged a bankrupt. In the bankruptcy proceedings, claims were proved and allowed in the sum of $4,313.29, and respondent, who qualified as trustee, was directed to bring this suit.

The first assignment of error is the overruling of the demurrer to the complaint. Appellant contends the contract declared upon is void, as by its terms it was not to be performed within one year. This is the same contention made by affirmative matter set out in the answer. Reliance is had on § 5289 of Rem. Code, to the effect that any agreement, contract, or promise shall be void unless it is in writing and signed in cases where by its terms it is not to be performed within a year; and our attention is called to the case of *Union Sav. & Trust Co. v. Krumm,* 88 Wash. 20, 152 Pac. 681. Neither the statute nor the case cited is applicable here. The statute covers situations like that discussed in the case cited where the subject-matter is the rendition of services, the case holding that an oral contract for a year's services, which is to commence *in futuro,* is within the statute. This is not such a case, but a sale and delivery of the stock of a

corporation, upon which a partial payment was made. It is not a contract for the sale of stocks at a future date, but a consummated sale. Such a transaction constitutes the sale and delivery of goods, wares and merchandise, according to the authority of *Hewson v. Peterman Mfg. Co.*, 76 Wash. 600, 136 Pac. 1158, Ann. Cas. 1915D 346, 51 L. R. A. (N. S.) 398, and certainly deferred payments thereon are enforceable, even if by the terms of the contract they reach beyond the period of one year.

It is further argued the complaint is insufficient for failure to allege respondent, as trustee, is without sufficient funds to pay all the creditors and the expenses of the bankruptcy proceedings, and the case of *Hibschman v. Bevis*, 103 Wash. 317, 174 Pac. 5, is relied on. The case is not in point. It was a suit to set aside a *fraudulent conveyance*, which, being good between the parties, could not be set aside by a creditor or a trustee in bankruptcy if the debtor had sufficient other property to pay his debts. Here, respondent, who represents the company, is suing to recover a debt due by appellant directly to the company which has been judicially declared to be a bankrupt, and the question if this money is needed to pay debts is wholly immaterial. Nor does the case of *DeMuth v. Faw*, 103 Wash. 279, 174 Pac. 18, help appellant; for it was a suit by a creditor to collect a debt due by a corporation then in the hands of a trustee in bankruptcy. It is also claimed there was no tender of the stock at and before suit. The complaint alleges it was sold and delivered. In this respect, so far as the proof is concerned, the attempt made by appellant, after he practically became the company, by a so-called escrow to circumvent his contract, will in no sense alter the terms of the contract. Even after the meeting at

which he presided declared he was entitled to receive 1,531 shares of the stock, he declined to call for it because it was not worth having; and later he transferred the remaining 679 shares to Stearns, considering it in effect a gift.

Assignments of error 2 to 19 relate to findings and conclusions signed and the refusal of the court to sign those presented by appellant. They present what counsel claim is the pertinent question in the case, viz., was the transaction a sale, or was it an option? This is more largely a question of fact. Notwithstanding some testimony to the contrary by witnesses who were allowed to explain their understanding of the deal, the record written and made by those same witnesses is plain that the transaction was a sale. The conduct of appellant after the initial transaction, while he was in control of the affairs of the company, pictures well but an attempt on his part to evade his obligation. The law will not permit him, at all times cognizant of the growing insolvency of the company, by such subterfuge to become released from his contract—which was about the only tangible valuable asset the company had at all times after he became connected with it—to the detriment of the rights of its creditors. On this subject the American rule, which results from the trust-fund doctrine, is that the funds of a corporation cannot be thus frittered away. The obligation of appellant in this case to pay for the treasury stock of the corporation was one of its assets, and it is clear he could not be altogether released from its payment, or his liability therefor limited by any agreement or arrangement between himself and the corporation or its agents, or by any resolution adopted by its directors, or by the stockholders themselves, to the prejudice

of the creditors. Nor could there be any reduction of the number of shares to be paid for, nor escape from liability by a transfer of shares to a person who for any cause is incapable of responding in respect of such liability, as against the rights of existing creditors. 7 R. C. L. 358, § 339; *Nathan v. Whitlock,* 9 Paige Ch. (N. Y.), 151; *National Carriage Mfg. Co. v. Story & Isham Commercial Co.,* 111 Cal. 531, 44 Pac. 157; *National Bank v. Case,* 99 U. S. (9 Otto) 628.

The only other assignment of error that need be noticed is that the court allowed interest on $5,231.19, the unpaid installments of the purchase price of the stock. The amounts and dates of maturity were certain and fixed by the positive terms of the contract, the forbearance of which, under the terms of the statute (Rem. Code, § 6250), called for interest at six per cent per annum, the amount allowed in the judgment.

Judgment affirmed.

CHADWICK, C. J., TOLMAN, MACKINTOSH, and MAIN, JJ., concur.

[No. 15082. Department One. May 13, 1919.]

MARTHA SMITH, *formerly Martha Frates, Respondent,* v. LOUIS A. FRATES, *Appellant.*[1]

DIVORCE (100, 104)—CUSTODY OF CHILDREN — MODIFICATION — EVIDENCE AS TO WELFARE. A decree of divorce awarding the custody of children of a grossly delinquent mother to the father, should not, on the remarriage of both parties, be modified and their custody awarded to the mother, where there is no question, from a material point of view, that the father's home is to be preferred for the welfare of the children, and the influence of the mother would be prejudicial to their best interests.

Appeal from a judgment of the superior court for King county, Ronald, J., entered June 1, 1918, modifying a decree of divorce as to the custody of children, after a hearing before the court. Reversed.

Howard O. Durk, for appellant.

Longfellow & Fitzpatrick, for respondent.

MITCHELL, J.—This controversy relates to the custody and welfare of three girls, now about twelve, ten, and eight years of age, respectively. Their parents, the parties to the suit, were married on December 30, 1905, and divorced on August 18, 1917. By the decree of divorce, all three of the children were awarded to the father. Each of the parents has since remarried, not one to the other. Upon application of the mother, the original decree was so modified that she was given "the absolute custody and control of said minor children," allowing the father to have them at specified occasional short periods of time. From the modified decree, the father has appealed.

The history of the case gives us very little trouble. The evidence is clear and convincing, much of it that

[1]Reported in 180 Pac. 880.

is most important being undisputed. At the time of the marriage of respondent, Martha Smith (formerly Mrs. Martha Frates), and appellant, Louis A. Frates, neither had any means. They purchased a place upon which a residence was built largely by his own labor in the evenings and on holidays. About the only fault she charged him with was the excessive use of intoxicating liquors while they were married, which is positively denied by him, his close neighbors, and his business career. He worked regularly for years for the same employer, at constantly increasing wages; and later conducted a business of his own, with employees to help. Among such employees, for some length of time, was the present husband of respondent. Appellant paid cash for his family expenses, modernized their six-room residence, improved the grounds with a lawn and fruit trees and owed only $700 on the residence at the date of the divorce. Respondent became frivolous, and finally habitually neglectful of her home and children. She often spent whole days, and more frequently afternoons and evenings until late at night, without her husband, downtown and at dances, leaving the children to be cared for by neighbors, without appointments therefor oftener than otherwise, until appellant would return from his work, when he would get the supper and put the children to bed. On account of her improper relations with appellant's brother, first denied but later admitted by her when confronted by the accusation of her own little daughter, she caused a lasting estrangement between the brothers. Still later, about July 16, 1916, she voluntarily confessed to her husband her criminal conduct with E. N. Smith, her present husband, who at that time was an employee of her husband's. Shortly, appellant's experience proved in no uncer-

tain way the verity of her confession. Within a little while, as she testifies herself, she deserted her husband while he was at work and the children were at school. She worked around at housework, corresponded with, and met Smith. In the meantime, for three or four months, appellant received the services of his children's maternal grandmother in caring for the children at his home, after which he placed them together, from time to time, at different homes of friends of his until after his second marriage. He preferred that she appear as plaintiff in the divorce suit. She gave him a conveyance of the property upon which there was a mortgage of $700 (since paid off by him), made no claim to the children at that time, and waived all claim for alimony. The decree entered in the divorce case on August 18, 1917, simply dissolved the bonds of matrimony existing between the parties, gave the care, custody and control of the three children to the defendant, and, as provided by statute, prohibited each party from contracting marriage with a third party within six months.

On the first day after the expiration of the limitation of time fixed in the decree, viz., February 18, 1918, she married Smith—the associate and author of her former delinquencies. She and her present husband own no property. After their marriage, they lived in a single housekeeping room in an apartment house until a few days before the hearing of her application for the custody of the children, when they rented and moved into a small house supplied with their furniture. Her husband works at one of the shipyards at Seattle where, notwithstanding the commonly-known high wages, he gets less than $4 per day for his work. She works at a store for small wages.

On the other hand, appellant and a partner conduct a growing business of their own which yields a net income of $200 per month to appellant. His present wife is the owner of a hospital in Seattle which receives the patronage influenced by twelve to fifteen reputable physicians. Her business is prospering and at the present time returns a net income of $300 per month. She takes an interest in the children, remaining at home until after they go to school, when she goes to her place of business for the day's work, returning in the late afternoon. Usually, on Saturday afternoons she takes the girls to a picture show or some other place of amusement, and on Sundays after they attend Sunday school she takes them out for a ride in appellant's family car. The children are well dressed and cared for at appellant's home, where they have the services of a housekeeper who has raised a family of nine children of her own.

The question of whether one of the parents shall prevail, in the spirit of victory over the other, is in no sense involved in this case. Their ways are divided; their rights are subordinate. The serious matter is the welfare of the children, who should be kept together, if possible, and not denied each the others' society. From a material point of view, there is no question appellant's home is to be preferred for the children. Other and more important considerations suggest the same course. In cases of divorce where children of very tender years are involved, other things being near equal, the mother is preferred as their custodian, more especially in the case of female children. But there are exceptions to this rule which become more controlling as the child grows older, the chief of which becomes impelling in the case of a female child as it reaches the age of ten or twelve

years. In the home of respondent and her present husband, these children would be constantly reminded of the past irregularities of a mother who, in order to finally consummate her present marriage, willingly and willfully abandoned her own children to their father whom she deserted. Such influences would be prejudicial to the best interests of the children, who should not be further denied their natural right simply out of respect for the holy institution of a mother's love, which in this case is proven to be dishonored by a maternal instinct more fancied than real. The children have lost their mother's influence; but no good reason is shown why they should lose the protection and care of their father.

Their best interests require a reversal of the decree appealed from, which is hereby directed.

CHADWICK, C. J., TOLMAN, MACKINTOSH, and MAIN, JJ., concur.

[No. 15090. Department One. May 13, 1919.]

THE STATE OF WASHINGTON, *on the Relation of the City of Seattle, Appellant*, v. PUBLIC SERVICE COMMISSION *et al., Respondents.*[1]

GAS (3) — REGULATION OF CHARGES — PUBLIC SERVICE HEARING — NOTICE. Irregularity in the public service commission hearing on an application to fix gas rates, without the ten days' notice required by Rem. Code, § 8626-80 (which is for the benefit of the one against whom the complaint is filed) is not available to a city which was not required to litigate the issue presented by its complaint until after the fullest opportunity to present its case.

SAME (3). Where the public service commission is proceeding on its own motion, under Rem. Code, § 8626-82, to hear an application to fix gas rates, the city cannot, by filing a complaint within ten days of the hearing, deprive the commission of power to proceed with the hearing.

[1]Reported in 180 Pac. 913.

SAME (3) — REGULATION OF CHARGES — REASONABLENESS — EVIDENCE—SUFFICIENCY. A gas company seeking a reasonable increase in rates, sustains the burden of proof imposed by Rem. Code, § 8626-82, where it submitted all the testimony, which included uncontested findings on previous hearings, records and detailed reports of experts justifying the increase, and it was also sustained by the commission's general knowledge as a result of previous experience and investigation.

SAME (3)—REGULATION OF CHARGES—REASONABLENESS. Rem. Code, § 8626-26, requiring rates to be just, fair, reasonable and sufficient, authorizes an adjustment between different classes of consumers, and an increase over those asked for, if necessary to make them just and fair to each class and to enable the company to continue to serve the public.

Appeal from a judgment of the superior court for Thurston county, Wilson, J., entered August 31, 1918, affirming, on certiorari, an order of the public service commission, establishing rates for gas service. Affirmed.

Walter F. Meier and *Thomas J. L. Kennedy,* for appellant.

Clise & Poe, for respondents.

TOLMAN, J.—The respondent Seattle Lighting Company is a public service corporation, engaged in the manufacture, distribution and sale of gas in the city of Seattle, under a franchise granted by the city. On September 18, 1917, the lighting company filed with the state public service commission a schedule of rates, known as tariff No. 2, which included a "ready to serve" charge of twenty-five cents per month, and substantially increased the rates for gas over the rates which had theretofore been in effect. The commission set the matter for hearing on October 15, 1917, and so advised the city officials by letter. On October 9, 1917, after the time for the hearing had been so fixed, the city filed a complaint with the commission in which it

alleged that the rates contemplated by the proposed tariff No. 2, were unjust, unreasonable, discriminatory, and unlawful, and prayed that such proposed tariff be suspended for ninety days, that a hearing be had, and that the lighting company be required to sell gas at the theretofore existing rates. At the time previously fixed for the hearing, the city appeared by one of the officers of its legal department and objected to a hearing being then had, because less than ten days had elapsed since the filing of its complaint, and no notice had been issued thereon, as required by the statute, Rem. Code, § 8626-80. The commission thereupon continued the hearing as to the city until October 26 following, directed notice to be given, and proceeded with the hearing as to the lighting company, permitting the city's legal representative to remain and participate in the proceedings. Witnesses were sworn and testified, and thereafter the hearing was continued to October 26. On October 22 the commission, on its own motion, entered an order further continuing the hearing until January 2, 1918, and providing that tariff No. 2 should become effective October 31, 1917, pending such hearing, and until the further order of the commission. The hearing of January 2 was adjourned at the request of the city to January 9, 1918. The lighting company then put in the remainder of its evidence, the city's evidence was introduced, the case was argued, and the hearing closed. Thereafter the commission made its findings of fact and final order, putting into effect a schedule of rates differing somewhat from tariff No. 2, excluding the "ready to serve" charge, and making such changes that it is now contended that some of the rates are raised above those contained in tariff No. 2, while others are lowered by such changes. This is now referred to as tariff No. 3.

The city sued out a writ of review in the superior court for Thurston county, and from a judgment of that court sustaining the action of the commission, the case is brought here on appeal. Errors are assigned to the following effect: First, that the commission was without jurisdiction to proceed on October 15, 1917, because ten days had not elapsed from the filing of the city's complaint, that the evidence taken on that day was a nullity, and that it was afterwards improperly considered by the commission; second, that the commission arbitrarily refused to place the burden of proof as to the justness and reasonableness of the proposed increase of rates upon the lighting company; third, that the order of the commission was not based upon competent proof; fourth, that the commission was without jurisdiction to establish rates higher than those proposed in tariff No. 2; fifth, that having put tariff No. 2 into effect pending the hearing, the commission is without jurisdiction in establishing tariff No. 3, to permit the lighting company to bill back or collect from customers for any excess of tariff No. 3 over tariff No. 2.

As to the first point, the statute, Rem. Code, § 8626-80, is framed for the protection of the one against whom the complaint is filed, and no objection has at any time been raised by the lighting company. The city was not required to litigate the issue raised by its complaint until after the expiration of ten days, and in the meantime was permitted to attend and participate through its legal department. Then and afterwards it had the fullest opportunity to protect its rights and present its case. Should we concede that the hearing of October 15 was irregular, still the city was not prejudiced thereby. The commission was proceeding upon its own motion for the hearing upon the

proposed tariff No. 2, filed by the lighting company, as it had power to do under § 8626-82 and other subdivisions of that section, and we cannot hold that, by the filing of a complaint within ten days prior to that hearing, the city could deprive the commission of power to proceed with the hearing already ordered. A very different question would be presented had the commission proceeded to make its final order on October 15 while the city's complaint was still pending and undetermined. The most that the city was entitled to was what it received, namely, the protection of all of its rights and the opportunity to present its case after ten days' notice.

Appellant's second point is based upon that portion of Rem. Code, § 8626-82, which provides:

"At any hearing involving any change in any schedule, classification, rule, or regulation, the effect of which is to increase any rate, fare, charge, rental or toll theretofore charged, the burden of proof to show that the changed schedule, classification, rule, or regulation, or the increased or proposed increased rate, fare, charge, rental or toll, is just and reasonable shall be upon the public service company."

The lighting company introduced at the hearing all of the testimony, exhibits, and the opinion and findings of fact received and made by the commission at previous hearings which had never been reviewed and which stood unchallenged and uncontested, and showed an investment by the lighting company at the time of such previous hearings of $9,285,642; and in the absence of fraud, no reason appears why that finding should not stand, except as added to or modified by subsequent changes in conditions. Many detailed reports of experts made from the lighting company's books and records were also introduced. Every witness examined with reference thereto testified to ad-

ditions made to the lighting company's properties since the previous hearings, and we think that, having due regard to the burden of proof placed on the lighting company by the statute quoted, the commission was fully justified in finding that the lighting company's investment had increased, and that it was entitled to earn a return based upon $10,194,259.74 invested. And this, too, if the testimony of the commission's expert, who had entered the military service of the United States before the city had an opportunity to cross-examine him, be wholly disregarded. The commission, in the making and approval of rates, must be guided by the statute. Rem. Code, § 8626-26.

"All charges made, demanded or received by any gas company, electrical company or water company for gas, electricity or water, or for any service rendered or to be rendered in connection therewith, shall be just, fair, reasonable and sufficient."

We said in *State ex rel. Northern Pac. R. Co. v. Public Service Commission,* 95 Wash. 376, 163 Pac. 1143:

"We think the commission as an administrative and regulative body has peculiar powers . . . It is not bound, as is a court, to acquire its information concerning all matters involved in the proceeding before it wholly and entirely from the evidence of witnesses or other evidence produced before it, but may take into consideration the results of its general investigations, general information upon a given subject within its powers, and all matters which affect the matter and concerning which it must determine the facts."

Following this rule, the burden of proof, which is on the lighting company, is met, not alone by the evidence actually introduced at the hearing, which we think in this case was sufficient (and it is immaterial whether that evidence was introduced by it or came from the commission's experts or others who examined into its affairs), but also by the general knowledge on the sub-

ject possessed by the commission, as a result of its previous experience and investigation.

The basis for rate fixing is defined by the statute, Rem. Code, § 8626-92, which presumably was followed in the earlier hearing, and appears to have been followed here, and the commission, after fixing the value of the lighting company's property for rate making purposes, found:

"There is an ever changing relationship between the cost of service and the rates of service. Not every slight change in this relationship calls for a readjustment in the rates. There, however, can be no question in the minds of our fair citizenship but what the abnormal times which now confront us have so disturbed all past relationships that there must be radical readjustments and these, in the great majority of cases, mean an increase in rates, which, upon the surface, would indicate that the many are being taxed for the benefit of the few. In other words, that the primary purpose is to fill the coffers of the corporations. An analysis, however, in practically all cases of increase will show that scarcely anything remains in the treasury of the corporation; that the money merely reaches that place to immediately go out in payment of increased cost of material and labor . . .

"We have in this case allowed the Seattle Lighting Company an increase in rates under which it may be able to earn a sum equal to increased cost of material and labor. We have not intended by this order to make it possible for this utility to return to its stockholders or bondholders one cent additional to what they received prior to war times."

All must realize that a public utility must have sufficient rates or it cannot continue to exist. And the commission's finding that the rates as fixed by it were just, fair, reasonable, and sufficient, must, from the record before us, be upheld.

While some of the rates provided by tariff No. 3 appear to be higher than the corresponding rates in

tariff No. 2, others are lower, and we cannot say that, as a whole, tariff No. 3 raises the rates above those provided in tariff No. 2. There is apparently an adjustment as to different classes of consumers, and it may well be that tariff No. 3 will, in actual operation, produce no more revenue than tariff No. 2. Again, the language of the statute requiring the rates to be "just, fair, reasonable, and sufficient," covers and authorizes an adjustment between different classes of consumers, in order that the rates may be just and fair to each class. And we are not now prepared to say that the statute does not authorize an increase of rates by the commission over those asked for, if it is satisfied by the evidence that such increase is necessary to enable a public utility company to continue to serve the public.

A reading of the order convinces us that it is not intended to and does not authorize the lighting company to bill back or collect from consumers any possible excess which may have accrued by reason of tariff No. 3 being substituted for tariff No. 2, as of the date the latter was made effective. On the contrary, the order does provide that, where the lighting company has collected an excess under tariff No. 2, such excess so collected shall be credited or paid to the consumer.

The judgment appealed from is affirmed.

CHADWICK, C. J., MITCHELL, MACKINTOSH, and MAIN, JJ., concur.

[No. 15151. Department One. May 13, 1919.]

In the Matter of the Estate of DAVID STEELE JOHNSTON *et al.*[1]

EXECUTORS AND ADMINISTRATORS (104) — JUDGMENT (100, 109) — VACATION — ORDER APPROVING ACCOUNT — IRREGULARITIES. The fact that an order approving an administrator's final account and decree of distribution is appealable as a final order to correct error of law does not limit the force of Rem. Code, § 464, authorizing its vacation or modification for irregularities in obtaining it in reciting the approval of claims and payment thereof not then disclosed by the record.

EXECUTORS AND ADMINISTRATORS (42-45)—SALES—RESPONSIBILITY OF ADMINISTRATOR. The intent of Rem. Code, § 1545, providing that an administrator shall not be responsible for loss in selling property at less than its appraised value, if the sale has been justly made, is to make him responsible only when a sale has been unjustly made, and not when irregularly made.

SAME (42-45). A sale by an administrator of lots, subject to mortgage that was being foreclosed, is not unjustly made, within Rem. Code, § 1545, although the sales were irregular and for much less than the appraised value, when, considering the incumbrance and the state of the market, it was probably the only course that would have enabled the estate to realize anything out of the property; and he therefore is not responsible for the loss in selling at less than the appraised value.

SAME (56, 57, 157)—SETTLEMENT—APPRAISED VALUE. An administrator should not be charged with the appraised value ($100,000) of corporate stock having no market value, the corporation being in difficulty and shortly a bankrupt, where it was held with consent of the heirs in the hope that it might become valuable, and where the administrator, by pledging the stock to the corporation, realized $7,500 in cash and obtained a discharge of the corporation's claim against the estate amounting to $14,000 additional; notwithstanding irregularities in his proceedings.

SAME (83, 159-1)—CLAIMS—FAILURE TO PRESENT—LIABILITY TO DISTRIBUTEES. An administrator will not be held in his final accounting for the amount of two claims against the estate which were not presented within the year limited to creditors, and other claims not indorsed as approved, where such claims were held back to assist the estate through financial difficulties until claimants were advised

[1]Reported in 181 Pac. 209.

that the administrator was prepared to pay, and where the payment was twice approved by the court, and under the circumstances the petitioners should not be permitted to profit by the irregularity.

SAME (157)—SETTLEMENT—APPRAISEMENT. An administrator *de bonis non* is not responsible on his final accounting for the amount of an unexplained penciled memorandum "money $631.49" in the inventory, which was a duplicate of the inventory theretofore filed, the only fair inference from the record being that it was money realized from the other property inventoried.

SAME (160)—COUNSEL FEES. The allowance of $1,025 for fees of an attorney for an executrix of an estate, appraised at $144,000, is excessive and should be reduced to $500, where $115,000 of the appraised property proved to be of little or no value.

SAME (165)—COMPENSATION—RATES AND COMPUTATION. The appraised value of the estate is only the prima facie value for figuring an administrator's statutory commissions, which should be based upon the total cash received from all sources, plus the value of real estate conveyed in satisfaction of debts, and plus the appraised value of household goods administered; and where that amounts to the sum of $39,831.24, the statutory commission is $1,633.24.

SAME (160-1)—COMPENSATION—RIGHT TO. An administrator is not to be deprived of his statutory compensation by reason of irregularities, where he was not guilty of fraud and administered the estate with great ability and resourcefulness in the face of financial difficulties.

SAME (165)—COMPENSATION—RATE AND COMPUTATION. Where an administrator *de bonis non* completes the administration commenced by a deceased executrix and also administers her estate, the statutory fees or commissions on final accounting should be pro rated between the two estates, and he should not receive commissions on the value of household goods that did not come into his possession, nor upon the interest of the deceased executrix in corporate stock that was never freed from the debts of the estate or distributed.

COSTS (80)—ON APPEAL—IMPROPER ABSTRACT. The appellant will not be allowed costs for an abstract on appeal which was argumentative and partisan and no aid to the court.

EXECUTORS AND ADMINISTRATORS—SETTLEMENT—INTEREST. Interest is properly allowable upon the balance due in the hands of the administrator at the legal rate, and payments to a legatee must be credited as of the time made.

Appeal from an order of the superior court for Pierce county, Chapman, J., entered September 28,

1918, approving the final account of an administrator and the decree of distribution, after a hearing before the court. Reversed.

L. B. La Ponte and *Ellis, Fletcher & Evans,* for appellants, contended, among other things, that the decree of July 1, distributing the estate and approving the final account having been set aside, cannot now be invoked in bar of the petition for an accounting. Rem. Code, §§ 161, 235, 464; *Hayes v. Peavey,* 54 Wash. 78, 102 Pac. 889; *Anderson v. Burgoyne,* 60 Wash. 511, 111 Pac. 777; *Litzell v. Hart,* 96 Wash. 471, 165 Pac. 393.

So far as the minors are concerned, they could reopen the case any time with one year after majority. Rem. Code, § 464, subd. 8; *Ball v. Clothier,* 34 Wash. 299, 75 Pac. 1099; *In re Nelson's Estate,* 26 S. D. 615, 129 N. W. 113.

The order of May 10 was void because taken in an *ex parte* proceeding. *Colkett v. Hammond,* 101 Wash. 416, 172 Pac. 548.

The so-called final decree distributing the estate subject to liens and claims was void for want of jurisdiction. Rem. Code, §§ 1576, 1577, 1608; *Huston v. Becker,* 15 Wash. 586, 47 Pac. 10; *Candelaria v. Miera,* 18 N. M. 107, 134 Pac. 829.

The order of May 10 and decree of July 1 were voidable for fraud practiced by Mr. Harvey on petitioners and on the court. *Krohn v. Hirsch,* 81 Wash. 222, 142 Pac. 647; *Sohler v. Sohler,* 135 Cal. 323, 67 Pac. 282, 87 Am. St. 98; *Aldrich v. Barton,* 138 Cal. 220, 71 Pac. 169, 94 Am. St. 43; *Silva v. Santos,* 138 Cal. 536, 71 Pac. 703; *Pollock v. Cox,* 108 Ga. 430, 34 S. E. 213.

As to the minors, the decree was void because the administrator could not act for them as guardian, the positions being hostile. 22 Cyc. 622; *Ponti v. Hoffman,*

87 Wash. 137, 151 Pac. 294; *Whitaker v. Ellis,* 102 Wash. 43, 172 Pac. 881; *Prince v. Mottman,* 84 Wash. 287, 146 Pac. 841; *In re Sholes' Estate,* 170 Iowa 43, 152 N. W. 3.

The sales of the lots under contract, without an order of court, were void. Rem. Code, § 1498; *Wallace v. Grant,* 27 Wash. 130, 67 Pac. 578; *In re McDonald's Estate,* 29 Wash. 422, 69 Pac. 1111; *English-McCaffery Logging Co. v. Clowe,* 29 Wash. 721, 70 Pac. 138.

Compliance with the statute of non-claim was essential. *Ash v. Clark,* 32 Wash. 390, 73 Pac. 351; *Ward v. Magaha,* 71 Wash. 679, 129 Pac. 395; *Foley v. McDonnell,* 48 Wash. 272, 93 Pac. 321; *Butterworth v. Brademeyer,* 89 Wash. 677, 155 Pac. 152; *In re Richardson's Estate,* 96 Wash. 123, 165 Pac. 656; *Osborn v. Forsythe,* 54 Okl. 40, 153 Pac. 207; *Huebner v. Sesseman,* 38 Neb. 78, 56 N. W. 697; *Miner v. Raymond,* 113 Mich. 28, 71 N. W. 501; *Nally v. McDonald,* 66 Cal. 530, 6 Pac. 390; *Kornegay v. Mayer,* 135 Ala. 141, 33 South. 36; *Municipal Court of Providence v. Wilbour,* 23 R. I. 95, 49 Atl. 488; *Farwell v. Richardson,* 10 N. D. 34, 84 N. W. 558.

The administrator, because of his fraud, misconduct and unlawful proceedings, has forfeited his right to fees and commissions. 18 Cyc. 1262, 1263; *In re Anderson,* 97 Wash. 688, 167 Pac. 71; *Wittemore v. Coleman,* 239 Ill. 450, 88 N. E. 228; *McIntire v. Mower,* 204 Mass. 233, 90 N. E. 567; *In re Hermann's Estate,* 226 Pa. 543, 75 Atl. 731; *Hall v. Santangelo,* 178 Ala. 447, 60 South. 168; *State ex rel. Bauman Jewelry Co. v. Taylor,* 112 Mo. App. 585, 87 S. W. 7; *Fluck v. Lake,* 54 N. J. Eq. 638, 35 Atl. 643.

The administrator is not entitled to fees and commissions prior to final settlement. *In re Hagerty's Estate,* 97 Wash. 491, 166 Pac. 1139.

In no event is the administrator entitled to commissions on the furniture because it was a specific legacy. 18 Cyc. 1147.

Hayden, Langhorne & Metzger and *Bates & Peterson* for respondent, among other things, to the point that the administrator had power to pledge the stock to pay the debts, and that the order entered was an appealable one, and that this present proceeding is a collateral attack thereon, cited: 11 R. C. L. 412; Schouler, Executors, §§ 349, 350; *Carter v. Manufacturers' Nat. Bank,* 71 Me. 448, 36 Am. Rep. 338; *Schell v. Deperven,* 198 Pa. 591, 48 Atl. 815; *Crocker v. Old Colony R. Co.,* 137 Mass. 417; *Goodwin v. American Nat. Bank,* 48 Conn. 550; *Moore v. American Loan & Trust Co.,* 15 N. Y. Supp. 382; *Pickens v. Yarborough's Adm'r,* 26 Ala. 417, 62 Am. Dec. 728; *Hemmy v. Hawkins,* 102 Wis. 56, 78 N. W. 177, 72 Am. St. 863; *Smith v. Ayer,* 101 U. S. 320; *Gottberg v. United States Nat. Bank,* 13 N. Y. Supp. 841; *Gottberg v. United States Bank,* 131 N. Y. 595, 30 N. E. 41.

There was no allegation or proof of fraud preventing petitioners from appearing and protecting their rights on the final hearing. *Meeker v. Waddle,* 83 Wash. 628, 145 Pac. 967; *Davis v. Seavy,* 95 Wash. 57, 163 Pac. 35, Ann. Cas. 1918D 314; *Burke v. Bladine,* 99 Wash. 383, 169 Pac. 811.

The powers of the executor under a nonintervention will pass to the administrator c. t. a. regardless of whether or not the power of sale provided for by the will is discretionary or imperative. 11 R. C. L. 422; *Davis v. Hoover,* 112 Ind. 423, 14 N. E. 468; *De Haven v. De Haven's Adm'r,* 104 Ky. 41, 46 S. W. 215, 47 S. W. 597; *May v. Brewster,* 187 Mass. 524, 73 N. E. 546; *Campbell v. Jennings,* 22 Misc. Rep. 406, 50 N. Y. Supp. 278; *Wilson v. Snow,* 228 U. S. 217, 50 L. R. A. (N. S.)

604; *Carpenter v. Bonner,* 50 N. Y. Supp. 298; *Scott v. Douglas,* 39 Misc. Rep. 555, 80 N. Y. Supp. 354.

Minors when represented by guardian *ad litem* are bound in the same manner and to the same degree as adults. 18 Cyc. 1190; Herman Estoppel, p. 178, § 164; 1 Daniel, Chancery Proceedings (5th Am. Ed.), 163, 164; *Kromer v. Friday,* 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671; *Burke v. Northern Pac. R. Co.,* 86 Wash. 37, 149 Pac. 335, Ann Cas. 1917B 919; *Clough v. Monro,* 86 Wash. 507, 150 Pac. 1190; *English v. Savage,* 5 Ore. 518; *Thompson v. Maxwell Land Grant & R. Co.,* 168 U. S. 415.

TOLMAN, J.—This is a proceeding brought by the heirs and legatees of David Steele Johnston, to set aside the order approving the final account of the administrator with the will annexed and the decree of distribution, and to obtain an accounting from such administrator. Also a like proceeding on behalf of the legatee of Marie Helen Johnston, based largely upon the same facts. It appears from the petition in the D. S. Johnston estate that the decedent died in Pierce county, Washington, on August 11, 1913, leaving a nonintervention will, by the terms of which he bequeathed to the petitioners James Ronald Simon and George Howard Simon, minor grandsons, the sum of $5,000 each. The household effects, jewelry, and silverware, were left to the widow, and the remainder of the estate was devised in certain allotted shares to the widow and certain children and grandchildren of the testator. The widow was named as executrix, without bond. The will was admitted to probate in Pierce county. The widow, Marie Helen Johnston, was confirmed as executrix, and entered upon her duties as such. On September 6, 1913, an inventory and appraisement were filed, showing the total value

of the estate to be $144,900, but no order of solvency was ever obtained. An order to publish notice to creditors was made, and without any other proceedings appearing of record in the estate, the executrix died on February 24, 1914, leaving a will by the terms of which she bequeathed her interest in the estate to Howard A. Johnston. Thereafter, with the consent of all interested, the respondent Walter M. Harvey, a practicing attorney of Pierce county, who had theretofore been the attorney and close personal friend of the deceased in his lifetime, and who was the attorney for the executrix up to the time of her death, was appointed administrator with the will annexed of both estates, and duly qualified as such. Respondent proceeded, by petition and order of court based thereon, to convey certain real estate belonging to the D. S. Johnston estate, appraised at $24,000, to the National Bank of Tacoma, in consideration of the assumption by the bank of $12,000 of mortgage indebtedness secured thereon, and the release and satisfaction of $10,200 of indebtedness due to it from that estate. This is the only act of the administrator not attacked or questioned by the petitioners.

The main contentions grow out of the manner in which the administrator handled some 347 vacant and unimproved lots lying in Woodlawn addition to Tacoma, appraised at $15,000; and 1,200 shares of the capital stock of Eilers Music House, a corporation, appraised at $100,000. We have with infinite care accomplished the herculean task of carefully reading and considering the 387 pages of printed briefs and the 177 pages of the abstract of the record; and the abstract proving to be argumentative and partisan, we have also been obliged to give the same painstaking study to the 151 pages of the record, the 306 pages of the statement of facts, and the voluminous files in both

probate proceedings, as would have been required had no abstract been furnished. The points raised are so many, and the irregularities complained of are so numerous, that it is manifestly impossible to discuss or even mention each of them without unduly extending this opinion; but whether mentioned or not, each has been given a careful study. The further facts will sufficiently appear as we proceed.

The trial court, after a full hearing upon the petitions, so far sustained them as to direct that the final report and account of the administrator and the decree of distribution in both estates be vacated, and the administrator was directed to file a new report and full accounting within twenty days. With this order the administrator complied and filed new final accounts not differing materially from the accounts which had been previously attacked and set aside. To these accounts or reports, petitioners filed objections and exceptions, raising the same issues as were previously raised by the petitions; and the matter coming on to be heard upon the exceptions in a different department and before another judge, upon the testimony previously taken, the trial court, after consideration, made an order to the effect that it was improper for him to review the rulings of an associate judge still sitting, or to express his views upon a matter already passed upon in another department of the same court, and directed that the exceptions be overruled and that the last report of the administrator in each case be approved as his former reports were approved in the other department, from which order in each case this appeal is prosecuted.

The motion to dismiss the appeal is not well taken and will be denied without a discussion of the reasons therefor.

It is contended by respondent that the order approving the final account and decree of distribution was a final order and, therefore, appealable, and that petitioners should have appealed therefrom instead of attacking it by petition to vacate in the court where made. It may be conceded that such is the rule where it is sought to correct an error of law made by the trial court. *Sound Inv. Co. v. Fairhaven Land Co.*, 45 Wash. 262, 88 Pac. 198, and cases there cited. But these authorities in nowise limit the force of our statute, Rem. Code, § 464, with reference to the vacation and modification of judgments. Appellants in filing their petition were apparently proceeding under subdivisions 3 and 4 of that statute, and perhaps also under subdivision 8, and they certainly charge every conceivable form of irregularity and make many harsh charges of fraud. Without going into detail, we find that the charges of irregularity were amply sustained, and that the court had, in the order and decree under attack, approved the payment of claims against the estate which were not presented within one year, had never been indorsed with the approval of the administrator or the judge, and could not then be found in the court files; as well as many other irregularities. In fact, it may be said that irregularity was the rule and regularity the exception, as is abundantly shown by the record now before us, though we think the charges of fraud, which were repeated and renewed in this court, are wholly unsustained and unproven. These irregularities, which unfortunately abound, bring the case within the purview of the statute, and place it without the rule laid down in *Sound Inv. Co. v. Fairhaven Land Co., supra.* It was said in *In re Doane's Estate,* 64 Wash. 303, 116 Pac. 847:

"We are not holding in this case that the superior court has no jurisdiction to set aside a decree settling a final account upon a proper showing."

Nor has the plain language of the statute been anywhere limited by construction, so far as we are now advised. Since we have found that there was no fraud proven, but that the irregularities, which cannot be denied, are sufficient under the statute to justify the vacation of the order and decree, we need not consider those cases in which it was sought to set aside a decree on the ground of fraud, after the expiration of the time fixed by the statute, either by direct or collateral attack. If, then, the trial court was justified in setting aside the order and decree because of irregularities in obtaining it, arising from the failure to comply with the statutes then in force governing the presentation, allowance, and filing of claims against the estate, whereby the decree was caused to recite the approval of, and the approval of the payment of, claims which the record failed to disclose and which could not then be legally enforced, we must now inquire whether, after the filing of a new account and the taking of evidence touching all of the charges made by the petitioners, and the objections and exceptions to the final account, in which proceeding all parties in interest were represented, the final account should have been approved.

We cannot discuss, or even state, many of appellant's contentions; but those not stated or discussed have been fully considered and found to be without merit. Confining this opinion to the principal contentions, we will very briefly refer to the following:

I. The lots in Woodlawn addition were appraised at $15,000, the greater part being covered by a mortgage for $3,800, upon which there was considerable accrued interest, and all being subject to taxes and

assessments amounting to approximately $2,000. Shortly after respondent qualified, proceedings to foreclose the mortgage were commenced. Respondent appeared in the foreclosure action, and as a matter of favor, and by dilatory tactics, considerably delayed the foreclosure. In the meantime he tried diligently to find a purchaser for this property, in whole or in part, without success, and finally, without authority from the heirs or from the court, he employed an agent to sell the lots at retail on contract, mostly with a small payment down, and the balance in monthly installments, agreeing to convey good title by deed when the purchase price was fully paid, the agent to receive 25 per cent of the sale price of each lot as his commission. About 140 lots were sold by this method, and written contracts were entered into with the purchasers. Respondent received from the agent, after the commissions had been deducted, $1,474.75, and in addition, there was paid to him direct by the purchasers $475. Not having realized enough money to pay off the mortgage and the tax liens, so as to clear the title and enable him to perform his contracts with the purchasers, and fearing that he would lose the property entirely through the expiration of the time for redemption, he, in connection with the loan which he was obtaining from the same source, which will be referred to later, conveyed all of the Woodlawn property by means of a deed in blank, executed by the adult heirs some time before in anticipation of a possible sale of the lots in bulk, which sale did not materialize, to a representative of the Eilers Music House, upon condition that respondent should furnish $2,000, out of the loan which he was then negotiating, toward the payment of the encumbrances on the lots, and the Eilers Music House should pay off the remainder of such encumbrances, so that the property would be freed from liens and that

part which had been sold on contract could be conveyed to the several purchasers. After this arrangement was completed, respondent sold the contracts which he then held for the lots previously sold, upon which there was still unpaid some $3,400 or $3,500, to the Eilers Music House for $2,850; but later took back a contract for $1,000, returning that much of the consideration, so that Eilers Music House actually paid him $1,850 for such of the contracts as they finally received. All of this was carried through without advising the heirs, and without any authority from the court, though after it was all completed, and on or about May 10, 1916, shortly before attempting to finally close the estate, these facts, with the exception of the sale and assignment of the contracts, were reported to the court by respondent, and on *ex parte* hearing without notice, an order approving the acts reported was made by the court. No books of account were kept by respondent covering this or any other of his financial transactions; and even the money received was sometimes deposited to his individual credit in the bank, instead of being all carried in a trust account; a course of conduct which must be condemned severely, whether or not loss follows. And yet counsel for appellants have not, by a long and skillful cross-examination, or by any other evidence, been able to present anything which raises even a doubt that all the money thus received by respondent has not been fully accounted for. Petitioners, while contending that these sales are void, are not here seeking to recover the lots sold, as indeed they could not in any action to which the purchasers are not parties. But their object is to hold the administrator for the appraised value of the Woodlawn lots, under §§ 1544 and 1545, Rem. Code, then in effect. The latter section provides:

". . . if any has been sold for less than the appraisement, he shall not be responsible for the loss if the sale has been unjustly (justly) made."

From which it is argued that, if the sale has been unjustly made, the administrator will be held to be liable. It will be observed that the intent of the statute is to create liability only when a sale has been unjustly made, and not when irregularly made. It must be conceded that these sales were irregularly made; but our careful study of the facts convinces us that, in view of the location and character of the property, the encumbrances thereon, and the condition of the market during the period in question, not only is there no evidence that the sales were unjustly made, but, on the contrary, the course followed by the administrator was probably the only course which would have enabled the estate to realize anything out of this property, and, therefore, there is no liability under the statute referred to. Still less is there a double liability under Rem. Code, § 1532.

II. The 1,200 shares of the capital stock of Eilers Music House, appraised at $100,000, were never sold, and shortly after the appraisement was made, the Eilers Music House became, if it was not already, involved in financial difficulties, and a committee of its creditors took charge of its affairs and remained in control for some time. True this committee was discharged before the estate was closed, but the corporation shortly thereafter went into bankruptcy, and at no time since the death of Mr. Johnston has it paid any dividends, nor has the stock had a market value. If it were ever saleable at all, which is extremely doubtful, it could have been sold only to some one already identified with the business, and presumably at a price not greater than its real value, and it is not reasonable to suppose that any person connected with the business

and familiar with the affairs of the corporation would at any time have paid any substantial sum for the stock. The administrator, the heirs, and those connected with the Eilers Music House, seemed to have hoped that the corporation would work out of its difficulties, and that its stock would sometime in the future become valuable. The stock was held by, and with the consent of, the heirs, in the hope that eventually something substantial might be realized therefrom. Without fully advising the heirs as to the conditions, and without previous authority from the court, the administrator pledged this stock to the Eilers Music House to secure a loan to the estate of $7,500 then obtained in cash, in connection with the transfer of the Woodlawn lots hereinbefore referred to, and also pledged the stock at the same time to secure payment of the claim of Eilers Music House against the estate, which had existed prior to Mr. Johnston's death, then amounting to upwards of $14,000. Since by this proceeding the estate actually realized $7,500 in cash from an asset which never was saleable, and has since become worthless, and the remainder of the estate has been freed from the previously existing indebtedness due the Eilers Music House, notwithstanding the irregularities complained of, we can see no justice in the demand that the administrator be charged with the appraised value of this stock.

III. The claims against the estate which were paid by the administrator amounting to $2,934.50, some of which were presented after the expiration of the statutory time, some of which bore no indorsement of approval of either the administrator or the judge, were no doubt irregularly paid. If the question were presented here by the holder, attempting to enforce payment upon a claim lacking something which the statute required him to do, we should be obliged to hold

that the law would give him no relief. *Butterworth v. Bredemeyer,* 89 Wash. 677, 155 Pac. 152; *In re Parkes' Estate,* 105 Wash. 586, 178 Pac. 830. These claims which were not presented within the year were a claim of one of the petitioners herein, who was a son of the deceased, and the McKenna claim, both of which were apparently held back out of a desire to assist the estate through its financial difficulties and until the claimants were advised that the administrator was prepared to pay. All of the other claims were duly presented, and each creditor did all that the statute then required him to do; the failure to approve, have the court approve, and file, was that of the administrator, who relies upon his approval shown in his final report, and the approval of the court in the order approving his final report. And under the peculiar conditions existing here, the petitioners should not be permitted to profit by the irregularity. These claims have all been paid, and the payment has been twice approved by the court below; and, except in one instance there is no contention but what they were just claims and the creditors were morally entitled to their money. Shall we then take from the creditors that which was rightfully theirs, though irregularly received, and give it to one who has no right thereto? Or shall we compel an administrator who has irregularly paid a just debt, because only of such irregularity, to again pay the money, not to the creditor, but to one who has no right thereto, either legally or morally? We think there is no warrant in law or equity for such a course. The one and only claim which is disputed is that of respondent for services rendered deceased in his lifetime, amounting to $450. This claim was presented within the year, was approved by the court, was on file, and is supported by respondent's testimony, drawn out by petitioners' own examination. There is

no evidence in the record disputing its justness or validity.

IV. The penciled memorandum in the inventory of "money $631.49," is not shown to have been money coming into the hands of the administrator. Respondent was appointed on April 4, 1914, and his inventory, which is a duplicate of the inventory theretofore filed by his predecessor, is dated January 3, 1915. The record contains no explanation of this item, respondent seemed wholly unable to explain it, and the only plausible explanation which occurs to us, supposing the memorandum to have been made by respondent in his own handwriting, is that, during the time which elapsed between the making of the first inventory and the making of the second inventory, this amount of money had been realized from some of the other items shown on the inventories. Petitioners do not attempt to show that any such amount of money was due the estate from any source, or ever came into respondent's hands, and we think the only fair inference is that, if it be a memorandum of money received, it was money realized from the other property inventoried.

V. The court in approving the final account allowed respondent $1,025 as attorney's fees, earned as attorney for Marie Helen Johnston during the time she acted as executrix; and it is stipulated that three well known and reputable members of the Pierce county bar would testify that the services were worth that sum. The allowance was made, and this testimony would have been given, upon the theory that the estate had assets of upwards of $144,000; while, as we have seen, by reason of there having been but little, if any, real value in the Woodlawn lots, and in the Eilers Music House stock, the actual value of the estate was hardly more than one-fourth that amount. The value of the estate being always an item to be taken into considera-

tion in fixing fees, we think the allowance here made was too much; and, in view of what the value of the estate has proved to be, as well as considering what the services were and the time over which they extended, as shown by the record, we think $500 an ample allowance for such fees.

VI. The court allowed the statutory administrator's fees, based upon the appraised value of the estate. While the appraised value may be the *prima facie* value, if nothing to the contrary is shown, here we have ample evidence of the real value, and the fees should have been based thereon. It is contended, however, that, under the authority of *In re Anderson,* 97 Wash. 688, 167 Pac. 71, no fees whatever should be allowed. We hold, however, from the whole record, that no fraud or misappropriation whatever has been shown. The respondent here had to, and did, show great resourcefulness and ability in handling and conserving the estate. His fault lay in not keeping proper records and accounts, in not procuring authority before he acted, in unintentionally, we think, misleading the heirs in his correspondence and reports, which was due primarily to his failure to keep accounts and refer to them for the facts in writing to the heirs, and in claiming excessive compensation. Our study of the record convinces us that a final account should be approved and an allowance of fees made as follows:

Money received from the sale of lots in Woodlawn addition through the sales agent	$1,474.75
Money received on such contracts, paid direct to the administrator	475.00
Received from Eilers Music House from sale of uncollected contracts	1,850.00
Received from Dr. Balabanoff	900.00

Total realized from Woodlawn lots	$4,699.75
Less amount paid by the administrator toward removing encumbrances	2,000.00
Amount actually received from sale of lots in Woodlawn addition	$2,699.75
To this should be added the loan from Eilers Music House, secured by stock as collateral	7,500.00
Deposited in National Bank of Tacoma	131.49
Collected from Eilers Music House debt due deceased	$2,000.00
Received from Howard A. Johnston as advances	400.50
Total cash received from all sources	$12,731.74

Disbursements on account of lots in Woodlawn addition:

Payment of taxes, commission, and attorney's fees	$152.43
Expenses of administration, taxes, inheritance tax, guardian ad litem fees, and attorney's fees as reduced	3,117.69
Payment of claims against estate	2,934.50
Total disbursements	$6,204.61
Net cash on hand	6,527.13

For the purpose of fixing the administrator's fees, the following items should be considered:

Total cash received by administrator from all sources, as before set forth, less advances by Howard A. Johnston, which were not a part of the estate	$12,331.24
Value of real estate conveyed to National Bank of Tacoma in satisfaction of debts	24,000.00
Appraised value of household goods	3,500.00
Total value of estate	$39,831.24
Statutory fees on this amount	1,633.24

This fee should be divided between respondent and the estate of Marie Helen Johnston, in the same proportion as the fee heretofore allowed was divided. Upon respondent's final report, as originally presented, and apparently at his request, and certainly with his consent, of the fee then claimed, approximately 17½ per cent was found to have been earned by the executrix prior to her death; and applying the same percentage here, $286 out of the $1,633.24 allowed as fees should be paid to the estate of Marie Helen Johnston and there accounted for. Deducting the $1,633.24 allowed as fees to the executrix and administrator with the will annexed, from the cash on hand of $6,527.13, leaves in the hands of the administrator, to be distributed under the terms of the will, $4,893.89.

With reference to the estate of Marie Helen Johnston, deceased, the respondent, as administrator with the will annexed, inventoried as assets of that estate $1,025 as commissions allowed the deceased as executrix of the estate of D. S. Johnston, which amount we have seen must be reduced to $286. The administrator also included in the inventory, and claimed commissions upon, the household furniture, etc., belonging to the estate of D. S. Johnston, which, as we have seen, was administered in that estate. Fees have been allowed thereon, and it must be held that such household property did not pass into the respondent's possession as administrator of the Marie Helen Johnston estate, and he is not entitled to compute administrator's fees again upon the value of that property. Respondent also inventoried and was allowed fees upon 200 shares of the capital stock of Eilers Music House, being the one-sixth interest in the 1,200 shares belonging to the estate of D. S. Johnston, deceased, which might have come to Marie Helen Johnston, had the same ever been

freed from the debts of the D. S. Johnston estate and distributed. This one-sixth interest, or 200 shares, was given an appraised value of $11,866. Manifestly the estate of Marie Helen Johnston never received any part of these shares, and the irregularity in reporting these items and claiming administrator's fees thereon, which approaches the nearest to bad faith of anything we have found in the record, was sufficient to justify the order setting aside the final account. The record convinces us that respondent's final report to the following effect may be approved, and fees allowed him as herein stated:

Cash collected on Detroit mortgage	$528.66
Fees as executrix of the estate of D. S. Johnston, deceased	286.00
Total cash received and total value of estate	$814.66

From which should be deducted the following disbursements:

Premium on bond	$66.67
Clerk's fees	10.75
Publication of notice to creditors	5.00
Filing final account and publication of show cause order	10.00
Statutory administrator's fees	57.02
Total disbursements	$149.44
Leaving on hand and subject to distribution under the terms of the will	665.22

The judgment appealed from is reversed, with directions to proceed in harmony with the views herein expressed. Appellant will not be permitted to recover costs of the abstract.

CHADWICK, C. J., MITCHELL, MACKINTOSH, and MAIN, JJ., concur.

ON PETITION FOR MODIFICATION.

[Decided August 5, 1919.]

PER CURIAM.—The decision in this case is silent on the matter of interest; and also fails to make mention of a payment of $500 made by the administrator with the will annexed of the estate of Marie Helen Johnston to Howard A. Johnston, the legatee. Interest is properly allowable upon the balance in the hands of the administrator on July 1, 1916, at the legal rate, and, of course, the payment to the legatee, which is not disputed, must be credited as of the time it was made. This expression of the views of this court may be read in connection with the original opinion, so that there may be no uncertainty as to its meaning upon these points.

[No. 15094. Department Two. May 13, 1919.]

SAM KUH, *Respondent*, v. GEORGE C. LEMCKE, *Appellant*.[1]

VENDOR AND PURCHASER (5, 6)—REQUISITES—OFFER TO SELL OR PURCHASE—ACCEPTANCE VARYING FROM OFFER. Though an agent was authorized by wire to accept a deposit on a proposed sale of lands, the minds of the parties did not meet and there was no binding contract for the sale, where the agent's earnest money receipt stated that the sale was subject to the owner's approval, and the owner declined to accept the terms proposed thereafter by which he was to pay taxes not due and accept seven per cent interest on deferred payments.

FRAUDS, STATUTE OF (35)—CONTRACT FOR BROKER'S COMMISSION—DESCRIPTION OF LAND. A contract for a broker's commission on the sale of "the north 10 acres of orchard tract seven miles west of T." does not sufficiently describe the land, within Rem. Code, § 5289, requiring the contract to be in writing.

Appeal from a judgment of the superior court for King county, Smith, J., entered September 6, 1918,

[1]Reported in 180 Pac. 889.

upon findings in favor of the plaintiff, upon overruling a demurrer to the complaint and assessing damages, in an action for breach of contract. Reversed.

Wright & Wright, for appellant.
Hal H. Cole and *Alexander & Bundy,* for respondent.

PARKER, J.—The plaintiff, Kuh, seeks recovery of damages which he claims to have suffered from the refusal of the defendant Lemcke to convey to him a tract of land in Yakima county, in compliance with a contract alleged to have been entered into between them for the sale of the land. The plaintiff also seeks recovery upon a second cause of action for commission for the sale of the land, claimed to have been earned by H. B. Miller, in effecting such sale as the agent of Lemcke, the claim for such commission having been assigned by Miller to the plaintiff. The defendant demurred to both causes of action. The demurrers were overruled by the superior court, and the defendant electing to stand upon his demurrers and not plead further, the court, after hearing evidence as to the amount of damages claimed to have been suffered by the plaintiff because of the defendant's refusal to comply with the alleged sale contract, rendered judgment in his favor upon both causes of action, as prayed for. From this disposition of the case, the defendant has appealed to this court.

The facts controlling the rights of the parties as to both causes of action may be summarized from the allegations of the complaint, as follows: Miller and respondent Kuh reside at Toppenish, in Yakima county. Appellant Lemcke resides at Seattle. The alleged sale and commission contracts are evidenced solely by the following correspondence and earnest

money receipt. On January 15, 1918, Miller wrote to Lemcke as follows:

"What is your price on the north 10 acres of Orchard tract seven miles west of Toppenish, which I understand belongs to you and what would your terms be thereon and when could possession be given."

On January 17th, Lemcke wrote to Miller saying: "Price should receive now is about $3,000"; suggesting part cash and part time payments, and that the purchaser could receive immediate possession. On January 19th, Miller wrote to Lemcke as follows:

"I have your letter of the 17th and made known your price to my prospective purchaser who declined same, but stated he would pay $2250 all cash for the property. You to deed clear and free to all incumbrances and you pay the taxes for the year 1917. My usual commission on the sale if you accept that price would be $112.50 or five per cent."

On January 21st, Lemcke wrote to Miller as follows:

"Replying to your offer of $2250 cash for my ranch beg to say that I will split the difference with your client of which $1250 can ride 4 yrs. if necessary. I will pay 5% commission and deliver property free and clear and give immediate delivery. If satisfactory take deposit of 10% . . ."

On January 24th, Miller telegraphed to Lemcke as follows:

"Party will pay twenty-five hundred, one-half cash, balance on or before four years. Wire."

Thereafter on the same day Lemcke telegraphed to Miller as follows:

"Accept deposit on twenty-five hundred dollars, twelve hundred fifty cash, balance four years."

On January 26th, Miller received from Kuh $500, and gave to him the following paper:

(Earnest Money Receipt) Jan. 26, 1918.

Received from Sam Kuh the sum of five hundred dollars ($500.00) being earnest money to be applied on the purchase price of $2500 for the premises situated in Yakima county, Wash., described as follows:

North ten acres of E½ of NE¼ 8-10-19 which premises have this day been purchased by said Sam Kuh.

The terms of purchase are as follows: $1250 total cash upon delivery of deed showing good and merchantable title & $1250 on or before 4 yrs. at 7% int. payable annually.

Sale is subject to approval of owner of premises . . .

(Signed) Sam Kuh
H. B. Miller, as agt. for owner
Geo. C. Lemcke and wife.

On the same day Miller wrote to Lemcke as follows:

"I have received your telegram of the 24th and accepted deposit of $500.00 on your ten acre tract on the basis of $2500. $1250 cash, balance on or before four years at 7% interest, interest payable annually.

"Please send deed and abstract at once and mortgage, unless you prefer we draw it here which can be done. You are to pay the taxes for the year 1917 and give possession at once. . . ."

On January 30th, Lemcke wrote to Miller as follows:

"In reply to your favor of the 26th will say that I cannot accept the proposition offered. I could not pay the 1917 taxes for they are not due, and the mortgage would have to bear 8% for that is what I am paying. In the meantime I have received a much better offer."

On February 1st, Kuh, the prospective purchaser, being advised by Miller of this letter from Lemcke, wrote to Miller as follows:

"I refer to your letter of the 31st and advise I will pay 8% on the deferred payment of $1250 on Lemcke land recently purchased thru you; also will pay 1917 taxes when they become due. You may so advise Mr. Lemcke . . ."

On the same day Miller wrote to Lemcke as follows:

"Purchaser consents to pay eight per cent interest on deferred payment of twelve fifty and pay taxes for year nineteen seventeen. . . ."

On February 7th, Miller wrote to Lemcke, enclosing a letter from Kuh, which letters were in substance a demand upon Lemcke that he convey the land, in compliance with the contract claimed by them to be evidenced by the foregoing correspondence and earnest money receipt.

It is contended in behalf of appellant Lemcke, as to the alleged sale contract, the one upon which the first cause of action is rested, that the minds of the parties never met so as to create any contractual relations on the part of Lemcke to consummate a sale of his land to Kuh. We feel constrained to hold that this contention must be sustained. It may be conceded, for argument's sake, that the telegrams of January 24th, passing between Miller and Lemcke, read in the light of their previous correspondence, gave Miller authority to accept a deposit from Kuh as the prospective purchaser, and thereby bind Lemcke to sell; but the acceptance of the $500 deposit from Kuh, and the giving to him of the earnest money receipt as evidence thereof, by Miller, did not bind Lemcke to sell, for it is expressly stated in the earnest money receipt that, "sale is subject to approval of owner of premises." When Lemcke was advised by Miller by letter of January 26th of the receiving of the earnest money deposit from Kuh, and that he, Lemcke, would have to pay the taxes of 1917, which were not then due, and accept seven per cent interest on the deferred installments of the purchase price, he declined to accede to those terms. In other words, Lemcke, by his letter of January 30th, refused to approve the earnest money receipt contract, as he had a right to do by the express terms thereof. It is true that thereafter on February 1st, Kuh did, by his

letter to Miller, offer to assume the taxes of 1917 and to pay eight per cent interest on the deferred installments of the purchase price; but that was after the rejection and disapproval by Lemcke of the earnest money receipt, and previous offers. It was not an offer by Kuh to meet an offer or proposal on the part of Lemcke which was then open for acceptance by Lemcke. Plainly at that time the minds of the parties had not met.

In *Minneapolis & St. Louis R. Co. v. Columbus Rolling Mill,* 119 U. S. 149, there were involved facts which, in their legal effect, we think, were the same as in this case, though somewhat less involved. The law here applicable we think is well stated in that case by Justice Gray, speaking for the court, as follows:

"As no contract is complete without the mutual assent of the parties, an offer to sell imposes no obligation until it is accepted according to its terms. So long as the offer has been neither accepted nor rejected, the negotiation remains open, and imposes no obligation upon either party; the one may decline to accept, or the other may withdraw his offer; and either rejection or withdrawal leaves the matter as if no offer had ever been made. A proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews it, or assents to the modification suggested. The other party, having once rejected the offer, cannot afterwards revive it by tendering an acceptance of it. . . . On December 18, the defendant by telegram declined to fulfill the plaintiff's order. The negotiation between the parties was thus closed, and the plaintiff could not afterwards fall back on the defendant's original offer. The plaintiff's attempt to do so, by the telegram of December 19, was therefore ineffectual and created no rights against the defendant."

In *Baker v. Johnson County,* 37 Iowa 186, the rule in such cases is stated as follows:

"An offer by one party assented to by the other will generally constitute a contract, but the assent must comprehend the whole of the proposition. It must be exactly equal to its extent and terms, and must not qualify them by any new matter. A proposal to accept, or an acceptance of, an offer on terms varying from those proposed, amounts to a rejection of the offer."

Our own recent decisions in *Nelson v. Davis,* 102 Wash. 313, 172 Pac. 1178, and *Sillman v. Spokane Savings & Loan Society,* 103 Wash. 619, 175 Pac. 296, are in harmony with this view of the law. We are of the opinion that there can be no recovery by respondent Kuh upon his first cause of action. It is to be noted that this is not an action to recover the $500 deposited by Kuh with Miller, for which the earnest money receipt was given; but it is an action to recover damages for Kuh's claimed loss of the bargain, independent of that money. Evidently there is no occasion for Kuh suing to recover that money. There is nothing in the record indicating that there is any disposition on the part of any one to withhold it from him.

As to the second cause of action, the one rested upon the alleged commission contract, it is contended in appellant Lemcke's behalf that there can be no recovery thereon, because no such contract is evidenced in writing, signed by Lemcke as the party to be charged, as is required by Rem. Code, § 5289. In none of the letters signed by either Miller or Lemcke, is the land mentioned or described with any greater particularity than as "the north 10 acres of orchard tract seven miles west of Toppenish," found in Miller's first letter of January 15th. Lemcke's letters do not mention the land even with this particularity; but, for argument's sake, we may assume that Lemcke's letters refer to the first letter of Miller and adopt the language of Miller in referring to the land. The letter of Lemcke

to Miller of January 30th, written after the giving of the earnest money receipt, in which the land is described, we have noticed is a rejection and disapproval of that contract and the other conditions stated in Miller's letter of January 26. Plainly this letter of Lemcke's, written January 30, constitutes no part of any commission contract with Miller. It has become the settled law of this state by our decisions (*Rogers v. Lippy,* 99 Wash. 312, 169 Pac. 858, L. R. A. 1918C 583, and *Nance v. Valentine,* 99 Wash. 323, 169 Pac. 862), that a description of land reading "the north 10 acres of orchard tract seven miles west of Toppenish," in a contract "employing an agent or broker to sell or purchase real estate for compensation or a commission," is not sufficient to satisfy, Rem. Code, § 5289, being our statute of frauds upon that subject. We are of the opinion that respondent Kuh cannot recover upon his second cause of action.

The judgment is reversed, and the action dismissed.

CHADWICK, C. J., MOUNT, and TOLMAN, JJ., concur.

[No. 15191. Department One. May 13, 1919.]

B. SCHMIDT, *Appellant*, v. W. L. POWELL, *Respondent*.[1]

PARTIES (2)—REAL PARTY IN INTEREST—BUSINESS NAME. In an action by B. Schmidt, a defect of parties plaintiff does not appear from the fact that the contract in suit was in the name of B. Schmidt & Co., where plaintiff was the only person interested in the company.

EVIDENCE (4, 4-1) — JUDICIAL NOTICE — GEOGRAPHICAL FACTS AND SURVEYS. The courts recognize abbreviations used in official government surveys and take judicial notice of the base and meridian lines and the location and number of the townships and ranges east or west within the state.

SAME (4). The superior court of a county will take judicial notice of the location of a town within its jurisdiction.

FRAUDS, STATUTE OF (35)—CONTRACT FOR BROKER'S COMMISSION—DESCRIPTION OF LAND. The description of land in a contract for a broker's commission as "S½ of S. E. 27-11-19," is sufficient, within the statute requiring the contract to be in writing, in view of the judicial notice as to the manner of survey and location of government base and meridian lines.

Appeal from a judgment of the superior court for Yakima county, Holden, J., entered May 10, 1918, dismissing, on the merits, an action for a broker's commission, tried to the court. Reversed.

Harold B. Gilbert, for appellant.
Henry H. Wende, for respondent.

MACKINTOSH, J.—The appellant asks to recover the sum of $1,000 as a real estate broker's commission for his services in procuring a purchaser ready, able and willing to buy the respondent's property. The appellant had an agreement, signed by the respondent, which reads as follows:

80 Ranch. Property of W. L. Powell. Address..... Number of 80 acres; 2½ miles from Wapato, south. Legal Description, S ½ of S. E. 27-11-19. Improvements..... I hereby

[1]Reported in 180 Pac. 892.

agree to pay a commission of 5 per cent to B. Schmidt & Co., if sale or trade is made by or through them. (Signed) W. L. Powell. Date, 2-28-17

The appellant's action was dismissed on respondent's attack against it upon three points: First, he claimed that there was a defect of parties plaintiff, in that the agreement on its face shows that the commission was to be paid to B. Schmidt & Co. The testimony, as it appears in the statement of facts, shows, however, that the appellant B. Schmidt was the only person interested in B. Schmidt & Co. It was next urged that the appellant had not found a purchaser ready, willing, and able to buy the property according to the terms of the listing. This also presents a question of fact which must be determined on the record adversely to the respondent's claim.

The third point raised by the respondent, and the one upon which the court below dismissed the action, presents the question as to whether the description in the agreement was sufficient to identify the property; the argument of the appellant upon this point being that the agreement was defective in that no mention was made therein of the state, county, or location as to base line or meridian. Respondent concedes that, in so far as the figures "27-11-19" are concerned, they are generally accepted as designating section, township, and range; but since there are both north and south townships, and east and west ranges, that the description is still indefinite in that it cannot be determined therefrom as to what county or state the property is located in or the location of the property as to the base line and meridian.

Ordinary abbreviations which are customarily used and generally understood are recognized by the courts, and so far as the abbreviations used in the agreement are concerned, there can be no doubt they were in-

tended to, and did, describe the south half of the southeast quarter of section 27, township eleven, range nineteen. This is strictly in accordance with the previous holdings of this court. *Carson v. Railsback,* 3 Wash. Terr. 168, 13 Pac. 618; *In re Wenatchee Reclamation District,* 91 Wash. 60, at page 68, 157 Pac. 38. These cases are also authority for the rule that the courts will take judicial notice of the manner of survey and location of base and meridian lines, they having been located by virtue of acts of Congress. The courts will also take notice of geographical position and location of cities and towns within their jurisdictions, and the superior court for Yakima county should have taken judicial notice of the fact that Wapato, mentioned in the agreement, was a town located in that county and that the description of the property in the agreement, locating it two and one-half miles south of that town, determined that property to be within the bounds of Yakima county. We must also know that townships are numbered north and south from base lines, and that the base line from which they are numbered in this state is the Willamette base line, and that ranges are located east and west of meridians, and that the meridian from which they are located in this state is the Willamette meridian, and that the Willamette base line intersects the Willamette meridian near the city of Portland, Oregon; and we must know that there are forty townships south of the base line and forty-one north thereof. From these facts, of which we have judicial notice, we must also know that, in this state, there can be no range 19 west of the Willamette meridian, and that such description would call for a location in the Pacific ocean, and therefore the "19" in the description must refer to range 19 E. W. M. We must also know that there are no townships south of the base line in the state of Washington, and therefore township

19 must be north. Taking into consideration these matters, of which we have judicial knowledge, and adding this information to the description in the agreement, makes the description sufficient to satisfy the statute.

This result does not trench upon the rule as announced by this court in other cases involving the sufficiency of descriptions contained in various instruments, including brokerage agreements; for, in determining the adequacy of the description here, no resort to parol testimony has been necessary. We have the description contained in the instrument, accompanied by the recognition of those facts which the court is bound to know, rendering the description full, adequate, and complete. Where descriptions have been held to be insufficient, it has been necessary, in order to determine the location of the property, to add to the words and figures contained in the description information which could only come through parol testimony. An examination of the following cases will show that they announce the doctrine that descriptions on their faces indefinite cannot be made sufficient by parol testimony, but in none of these cases was involved the question of whether a description apparently insufficient may be rendered sufficient when interpreted by the facts of which the courts will take judicial notice. *Broadway Hospital and Sanitarium v. Decker,* 47 Wash. 586, 92 Pac. 445; *Cushing v. Monarch Timber Co.,* 75 Wash. 678, 135 Pac. 660, Ann. Cas. 1914 C 1239; *Thompson v. English,* 76 Wash. 23, 135 Pac. 664; *Baylor v. Tolliver,* 81 Wash. 257, 142 Pac. 678; *Salin v. Roy,* 81 Wash. 261, 142 Pac. 679; *Gilman v. Brunton,* 94 Wash. 1, 161 Pac. 835; *West v. Cave,* 98 Wash. 237, 167 Pac. 747; *Rogers v. Lippy,* 99 Wash. 312, 169 Pac. 858, L. R. A. 1918C 583; *Nance v. Valentine,* 99 Wash.

323, 169 Pac. 862; *LaRue v. Farmers' & Mechanics Bank*, 102 Wash. 434, 172 Pac. 1146.

The case of *Hartigan v. Hoffman*, 16 Wash. 34, 47 Pac. 217, while recognizing that judicial notice would be taken of the system of public surveys, held that such judicial knowledge would not be of assistance to the case then under consideration for the reason that, by the addition of that knowledge to the information, still the description would then be applicable to many other states than the state of Washington. That case is distinguished from the case at bar by reason of the fact that here the judicial knowledge of the location of the town of Wapato identifies the state.

The action of the superior court is reversed.

MITCHELL, TOLMAN, and MAIN, JJ., concur.

[No. 15193. Department Two. May 13, 1919.]

N. C. LLOYD, *Respondent*, v. NORTHERN PACIFIC RAILWAY COMPANY, *Appellant*.[1]

NEGLIGENCE (22-1—24) — IMPUTED NEGLIGENCE—SERVANTS—SCOPE OF EMPLOYMENT. In an action for injuries sustained at a railroad crossing through the concurrent negligence of the company and the driver of the car, it cannot be said, as a matter of law, that the driver, who was employed as a farm hand, was not acting in the course of his employment so that his contributory negligence would be imputable to his employer, where it appears that, although it was Sunday and he was taking a young lady for a ride, he stopped at the express office to procure an express package addressed to his employer, as he had done on other occasions without express direction to do so.

BAILMENT (3) — NEGLIGENCE (22-1—24) — IMPUTED NEGLIGENCE — SERVANT OR BAILEE. Where a farm hand was, on Sunday, driving his employer's automobile for his own pleasure, when it was struck at a railroad crossing, his relation was that of a bailee, and his own contributory negligence is not imputable to the owner and is no

[1]Reported in 181 Pac. 29.

defense to an action against the company, although he was employed at "so much a month and had the use of the car."

CHADWICK, C. J., dissents.

Appeal from a judgment of the superior court for Franklin county, Truax, J., entered September 14, 1918, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages to an automobile, struck by a train at a crossing. Affirmed.

Cannon & Ferris and *Edward A. Davis,* for appellant.

M. L. Driscoll, for respondent.

PARKER, J.—The plaintiff, Lloyd, seeks recovery of damages for injury to his automobile, claimed to have been caused by the negligent operation of one of the trains of the defendant railway company, at a public crossing in the village of Eltopia, in Franklin county. Trial in the superior court for that county, sitting with a jury, resulted in verdict and judgment in favor of the plaintiff, from which the defendant has appealed to this court.

Respondent's automobile was being driven by Richard Colley, on Sunday, June 24, 1917, when it was struck by one of appellant's trains, causing the injury thereto for which recovery is sought. For a period of some three months prior thereto, Colley had been working for respondent upon his farm, situated some two miles distant from Eltopia, under an employment agreement by which Colley was to receive a certain sum per month, and the use of the automobile for his own pleasure, from time to time, as occasion therefor might arise. During the afternoon of the Sunday in question, Colley took a young lady for a pleasure ride in the automobile. Just what their destination was is not clear; but upon their return they went a short

distance out of their way, with a view, on the part of Colley, of going through Eltopia, and calling upon the railway company's agent there and procuring an express package which he thought might be there for respondent. He had not been instructed by respondent to call for any such package; nor is there anything in the record to show that either he or respondent thought of his calling upon the agent of the railway company for any such package when he started with the automobile. He had, however, on some previous occasions, brought packages from the agent of the railway company which had been shipped to Eltopia in respondent's name. This he had done without any special instructions from respondent. Upon this occasion, Colley received from the agent a package addressed to respondent, and placed it in the automobile, when he and the young lady proceeded in the automobile on their way towards respondent's farm, which rendered it necessary for them to cross appellant's track in Eltopia; and it was while so crossing the track that the automobile was injured by being struck by one of appellant's trains. While the jury returned a general verdict in favor of respondent, awarding him damages in the sum of $450, the jury were also asked, and answered, special interrogatories submitted by the court, as follows:

"Interrogatory 1: Was there negligence on the part of the Northern Pacific Railway Company, which negligence was the proximate cause of the damage to plaintiff's automobile? Answer: Yes.

"Interrogatory 2: Was there negligence on the part of Richard F. Colley, the driver of the automobile, contributing to the damage to the plaintiff's automobile? Answer: Yes.

"Interrogatory 3: At the time of the collision was Richard F. Colley driving or using the automobile for or on behalf of the plaintiff, N. C. Lloyd, or in con-

nection with the plaintiff's business, or in the course of his employment as an employee of the plaintiff? Answer: No.

"Interrogatory 4: At the time of the collision, was Richard F. Colley driving the automobile for private purposes or for his own pleasure? Answer: Yes."

A motion for judgment in appellant's favor, notwithstanding the verdict, was timely made by its counsel, the denial of which by the trial court is assigned as error.

The first contention made in appellant's behalf is, in substance, that the evidence conclusively shows that Colley was, at the time of the injury of the automobile, acting in the course of his employment for respondent, so that his contributory negligence thereby became the contributory negligence of respondent preventing his recovery, and that the trial court should have so decided as a matter of law. It seems to us that, under the circumstances here shown, the question whether or not the driving of the automobile at the time it was injured was being done by Colley as the agent and employee of respondent, or was being done by him for his own private purpose and pleasure, was a question for the jury to decide. Aside from the fact that Colley procured from the railway company's agent the package for respondent, and had it in the automobile when it was injured, there seems to be but little room for arguing that he was at that time doing anything other than for himself. And we think the mere fact that he had procured the package just before the automobile was injured, and then had it with him in the automobile, did not so plainly render his driving the automobile at the time it was injured the performance of his duties as respondent's employee that it could be so decided as a matter of law. The jury we think might, under all the circumstances,

have well concluded that Colley's procuring of the package was a mere matter of accommodation, as if such act had been performed by a neighbor. Our conclusion upon this branch of the case finds support in our decisions in *Hammons v. Setzer,* 72 Wash. 550, 130 Pac. 1141; *George v. Carstens Packing Co.,* 91 Wash. 637, 158 Pac. 529, and *Warren v. Norguard,* 103 Wash. 284, 174 Pac. 7.

It is further contended in appellant's behalf that the contributory negligence of Colley, as found by the jury, was in any event imputable to respondent, preventing his recovery, and that the trial court should have so decided as a matter of law. This contention is rested upon the theory that, because of the relationship between Colley and respondent with reference to the automobile, though it only be that of bailor and bailee, respondent cannot recover for the injury to the automobile, because Colley's contributory negligence would prevent his recovery for injury to the automobile. There was a time when the decisions of the courts seemed to support this view of the law; but in recent years, the weight of authority is, we think, decidedly to the contrary.

In view of the special finding of the jury that Colley was, at the time the injury to the automobile occurred, driving it for his own pleasure, and not in the course of his employment as respondent's employee, which finding we think the evidence fully supports, it seems plain that the relation then existing between him and respondent with reference to the automobile was merely that of bailor and bailee. Van Zile, Bailments (2d ed.), §§ 3 and 4; 6 C. J. 1101; 3 R. C. L. 72. Whether the automobile was in legal effect hired to Colley or gratuitously loaned to him, we think is of no moment here, since Colley would be no more the agent of respondent in one case than in the other.

In *Gibson v. Bessemer & L. E. R. Co.*, 226 Pa. 198, 75 Atl. 194, 27 L. R. A. (N. S.) 689, there was involved the hiring of a horse from a livery stable keeper, and the killing of the horse by the railroad company while being driven by the bailee. The railroad company resisted the claim of damage made by the owner for the killing of the horse, upon the ground of the bailee's contributory negligence in driving upon the track. Holding that the negligence of the bailee was not attributable to the bailor, the owner of the horse, preventing his recovery, Justice Potter, speaking for the court, observed:

"And in Edwards on Bailments (3d ed., 1893), sec. 392, it is said: 'The hirer of wagons, or carriages and horses, receiving them into his custody to be used by him at his pleasure, becomes a bailee, and is in no sense a servant of the owner. He is responsible to the owner for the reasonable care of them, and to third persons for any negligence of his servants in the use of them. He is liable to third persons to the same extent as if he were the actual owner of the vehicles and teams used by him.' And again, in 1 Thompson on Negligence (1901), sec. 512, it is said: 'Unless the principles upon which the courts have at last settled have been grossly misconceived, the negligence of a bailee or his servants is not imputable to his bailor.' As far back as the case of *Bard v. Yohn*, 26 Pa. 482, Justice Knox stated the law as follows (p. 489): 'If one lets or hires to another a horse to be used exclusively for the purposes of the latter, the owner of the horse is in nowise responsible for the negligent manner in which the horse may be used.'

"There is a difference where the owner sends a driver to manage and control the team and vehicle, for in so doing the owner retains the control, and may well be held accountable for the action of the driver, his servant and agent. But in the present case no driver was furnished and the hirer assumed the care and control of the horse. There was no relation of

master and servant, or of principal and agent between the hirer and the liveryman, and the latter cannot be held responsible for the negligence of the former. Each must recover in his own right, if at all, and each must stand upon his own ground. Had Lantz, the hirer, brought suit and shown negligence by the defendant, and no negligence upon his own part, he could have recovered for damage to himself, but not for damage to the horse or vehicle. His right of action depended in no way upon that of the present plaintiff, nor does the right of recovery in the present action depend upon the right of the bailee to recover."

In *New York, L. E. & W. R. Co. v. New Jersey Elec. R. Co.*, 60 N. J. L. 338, 38 Atl. 828, 43 L. R. A. 849, there was involved a bailment arising out of the hiring of cars which were injured in a collision resulting from the concurring negligence of the bailee and the defendant company. It was sought by the defendant company to escape liability to the bailor, the owner of the cars, upon the ground of the bailee's contributory negligence being in law imputed to the bailor. In concluding an exhaustive and well considered opinion, Justice Lippincott, speaking for the New Jersey court of appeals, said:

"I cannot perceive that whether, in respect to this action, the duty of the defendant and the bailee were joint or separate can make any difference. If the same duty of care was due and owing to the plaintiff, then a common neglect of that duty would render them both liable as joint tort feasors. If the duty to plaintiff was a separate one which was neglected to be performed by each of them, although the duties were diverse and disconnected, and the negligence of each was without concert, if such neglects concurred and united in causing the injury, the tort still is equally joint, and the tort feasors are subject to a like liability. *Matthews v. Delaware, L. & W. R. Co.*, 27 Vroom 34. The bailee was bound to use reasonable care and diligence in the preservation of the property from in-

jury. The defendant, in the operation of the electric car, was bound to exercise reasonable care in avoiding injury to the property of which the plaintiff was the owner. It would seem that the intervention of the negligence of the bailee could not shield the defendant from injury caused by its own negligence. Both might have been selected as joint tort feasors, or the action could be maintained against either. The conclusion reached is that the plaintiff had the right to sue either or both of these companies for the injuries arising from their negligence to the locomotive and cars of the plaintiff, and it is not a defence to the action that the accident was contributed to by the negligence of the other. Each is liable upon its own negligence, and the negligence of the bailee is not imputable to the plaintiff as a shield to the defendant against recovery."

In *Sea Insurance Co. v. Vicksburg, S. & P. R. Co.*, 159 Fed. 676, 17 L. R. A. (N. S.) 925, the Federal Circuit Court of Appeals for the Fifth Circuit had under consideration a bailment consisting of the leaving of cotton with a compress company, to be bailed. In holding that the loss of the cotton by fire, resulting from the negligence of the railway company, contributed to by the negligence of the bailee, would not prevent recovery by the insurance company as assignee of the bailor, Judge Shelby, speaking for the court, said in part:

"A plaintiff cannot recover damages for an injury to which he has directly contributed by his own negligence. If the plaintiff's own fault, whether of commission or omission, has materially contributed to the injury, the plaintiff is without remedy against one also in the wrong. The converse of this doctrine ought to follow as a necessary corollary—that when one has been injured by the wrongful act of another, to which he has in no way contributed, he should be entitled to compensation from the wrongdoer, unless the negligence of someone towards whom he stands in the rela-

tion of principal or master has materially contributed to the injury. The bailor, we hold, is not the principal or master of the bailee."

In *Spelman v. Delano,* 177 Mo. App. 28, 163 S. W. 300, the court had under consideration a bailment in substance the same as that which is here involved; that is, it was the case of a farm hand having the use for his own pleasure of a horse belonging to his employer. While he was riding the horse, it was killed by the railway company of which the defendant was receiver, the death of the horse being the result of the negligence of the railway servants and the contributory negligence of the farm hand, the bailee. Holding that his contributory negligence was not imputable to the bailor, his employer, Judge Trimble, speaking for the court, made the following pertinent observations:

"It must be remembered that the question in the case at bar does not involve a bailment in which the bailee is the agent or servant of the bailor, nor is there any privity of contract between them. Unless, indeed, it can be said that the bailor, merely by lending the horse, makes the bailee his agent to care for the horse and thereby creates such a relation as will make the bailor responsible for the acts of the bailee. Now, it cannot be said that if the bailee had, after borrowing the animal for his own purpose, negligently ridden against another and injured him, the injured person could have any right of recovery against the bailor. If it be said that the bailor, by lending the horse, makes the bailee an agent for the care thereof and is thereby impliedly responsible for the latter's conduct in reference thereto, and also makes it possible for the injury to occur, the answer is that the bailee is not the bailor's agent in caring for the horse else the bailor would be responsible for a negligent injury committed by the bailee in using the horse, and this has never been held to be so. If the bailee failed to exercise the proper care, the bailor would

have a right of action against him; and he would also have a right of action against a third party for negligently injuring him. And when the negligence of the two concurs he can sue both jointly or sue either one as he chooses. And if lending the horse can be said to render it possible for the injury to occur, the act of lending was not such as to render plaintiff blameworthy in any degree. So that we have a case where a plaintiff, without fault or negligence of his own, is suing for a loss occasioned by the concurrent negligence of two others. In such case can one of the persons in fault set up in defense the fault of the other, as against the owner who is wholly without fault? We think not, and, while at first blush, the rule that the contributory negligence of a bailee cannot be imputed to a bailor when suing a third person for injuries to property, may seem unjust; yet, *when the rule is confined to those bailments which do not involve any privity of contract or agency between the bailor and bailee,* it will not appear to be so harsh and unreasonable as might be supposed."

That decision contains one of the best reviews of the cases upon this subject to be found in the books. The following decisions are also in harmony with and support this view of the law: *Alabama Great Southern R. Co. v. Clarke,* 145 Ala. 459, 39 South. 816; *Currie v. Consolidated R. Co.,* 81 Conn. 383, 71 Atl. 356; *Henderson v. Chicago Rys. Co.,* 170 Ill. App. 616; *Goldsmith v. Chicago, Milwaukee & St. Paul R. Co.,* 176 Ill. App. 336.

Our own decisions are quite in harmony with this view of the law, though they deal only with the question of the contributory negligence of the drivers of vehicles resulting in injuries to passengers therein, both for hire and as an accommodation. See, *Allen v. Walla Walla Valley R. Co.,* 96 Wash. 397, 165 Pac. 99, and our previous decisions therein cited. All of the decisions above noticed were rendered since the year

1897. In the late work of Van Zile, Bailments, § 128, that learned author states the law to be as above indicated.

The only decisions called to our attention which may be considered as lending support to the contrary view, are the following: *Puterbaugh v. Reasor,* 9 Ohio St. 484, decided in 1859; *Forks Township v. King,* 84 Pa. St. 230, decided in 1876, which decision, in so far as it may be regarded as authority upon this question is, in effect, overruled by the later decision of that court in *Gibson v. Bessemer & L. E. R. Co., supra; Welty v. Indianapolis & V. R. Co.,* 105 Ind. 55, 4 N. E. 410, decided in 1886, a critical reading of which case we think will show that it is, in at least some measure, distinguishable from the one before us; and *Illinois Cent. R. Co. v. Sims,* 77 Miss. 325, 27 South. 527, 49 L. R. A. 322, decided in the year 1900.

We are quite convinced that the decided weight of authority at the present time, and also the better reason, supports the view that the contributory negligence of Colley was not imputable to respondent, under the facts of this case as found by the jury.

The judgment is affirmed.

HOLCOMB, MOUNT, and FULLERTON, JJ., concur.

CHADWICK, C. J. (dissenting)—I do not agree with my esteemed associates. They have, as I believe, reasoned from a false premise. It is that Colley was a mere borrower or a gratuitous bailee, and was not engaged in his employer's (respondent's) business; and although there be some authority holding that the negligence of a gratuitous bailee may be imputed to the bailor, the later and better authority is to the contrary. I am willing to admit, for the purposes of this argument, that the holding of the court is sound and that the conclusion reached by the majority is sus-

tained by later authority (3 R. C. L., p. 147), although the rule is otherwise laid down in 29 Cyc. 546, and the annotator of the L. R. A. Reports says of *Sea Insurance Co. v. Vicksburg, S. & P. R. Co.*, cited in 17 L. R. A. (N. S.) 925, that "the only case found supporting the conclusion reached . . . is *New York, L. E. & W. R. Co. v. New Jersey Electric R. Co.*, 60 N. J. L. 338, 38 Atl. 828, 43 L. R. A. 849.

In the later annotation of *Gibson v. Bessemer & L. E. R. Co.*, 27 L. R. A. (N. S.) 689, it is said:

"Perhaps, *Gibson v. Bessemer & L. E. R. Co.*, which is in harmony with the *Sea Ins. Co.* case and *New York, L. E. & W. R. Co. v. New Jersey Electric R. Co.*, . . . may be regarded as sufficient to turn the scale in favor of the other side of the proposition."

But the law relied on does not reach or control the undisputed facts in this case, nor do any of the cases cited deny the principle for which I shall contend. It is, where property is not merely loaned to the user, but is turned over to him under a contract of use and as a part consideration for services rendered, the owner may not recover if the party to whom he has given the use of his property has been guilty of contributory negligence. It must be borne in mind that Colley did not hire the machine, nor was he using it as a mere gratuity. He had the use of it as part payment of a debt due from the owner, and as to third persons he was in legal effect and to all intents and purposes the owner of the machine. The machine had been bought by respondent and Colley, and was owned jointly by them for a time. Respondent, after two or three months, bought Colley's interest. Respondent testifies that Colley, who had worked for him for about three years, continued in his employment after the purchase of the machine under an arrangement whereby Colley was to get "so much a month and had

the use of the car," and that this arrangement had been in effect from November, 1916, up until the time of the accident. He further testifies that, from the time of the purchase of his interest, Colley, "was to have the use of the car and so much per month;" and,

"Q. When you bought back the half interest, it was the understanding that he at all times should have the use of the car in addition to his wages, and whenever he wanted to go anywhere he could take the car? A. Yes, sir. Q. In other words, the car was furnished you as part payment for your employment there? A. Yes, sir. Q. And you had been using the car that way for several months before the accident? A. Yes, sir, I had."

It is unnecessary to review the authorities cited by the majority. A brief reference to the case of *Spelman v. Delano,* 177 Mo. App. 28, 42, 163 S. W. 300, so strongly relied on by the writer of the opinion, will sufficiently illustrate my thought. The proper distinction is noted.

"The weight of authority seems to be clearly in favor of the rule that in a case where the circumstances show that the relation between the owner of the property and the one in possession of it at the time of its destruction is simply that of bailor and bailee, and does not involve any element of partnership, principal and agent, or master and servant, existing between them, then the contributory negligence of the bailee is not imputable to the bailor, in an action by the bailor against a third party for negligently destroying the bailor's property."

In *Sea Insurance Co. v. Vicksburg, S. & P. R. Co.,* 159 Fed. 676, 17 L. R. A. (N. S.) 925, the court qualifies the rule:

"When one has been injured by the wrongful act of another, to which he has in no way contributed, he should be entitled to compensation from the wrongdoer, unless the negligence of some one towards whom

he stands in the relation of principal or master has materially contributed to the injury."

The case of *Spelman v. Delano* was one of gratuitous bailment. The party in whose hand the property was at the time of the injury was a mere borrower.

"Plaintiff was under no obligation to transport Cook to and from his place of labor. His lending the horse to Cook was no part of the contract between them."

The case is distinguished from a case such as we have at bar upon that ground. Here the use of the automobile was a part of the contract of employment, and when respondent gave Colley the use of his machine in payment of his wages instead of money, he vouched for and became a guarantor of his competency to handle the machine and answerable for his due care in driving it, just as much as if he had employed him to drive the machine as a stage or as a delivery wagon. If Colley had negligently injured a third party, a court or jury would have surely held respondent to answer in damages upon the theory of agency or master and servant. He would not, in such case, be heard to repudiate his contract; then why in this? The falsity of the premise of the majority is, therefore, disclosed in the first line of the quotation from the *Spelman* case.

"It must be remembered that the question in the case at bar does not involve a bailment in which the bailee is the agent or servant of the bailor, nor is there any privity of contract between them."

If there be not privity of contract between the respondent and Colley, I would be at a loss to contrive a state of facts out of which such relation might arise. Had the quotation begun in the preceding paragraph,

the majority would have sounded the bottom upon which this case should be made to rest.

"Of course if, by reason of the circumstances of the bailment, there is a privity of contract between the bailor and bailee, so that the bailee can be regarded as the agent of the bailor, then the negligence of the former should be imputed to the latter, the same as when the relation of master and servant exists between them."

Now in the case at bar, it will not be disputed that the relation of master and servant existed at the time the contract was entered into and that the right to use the automobile as part remuneration for services rested in that relation. So, if the parties were master and servant at the time the contract was made, they must of necessity remain in that relation so long as the property was used under the terms and in the manner provided in the contract. That is to say, if they are master and servant as between themselves, they must, under all authority, remain master and servant as to third parties.

The harshness of the rule asserted by the majority, even in cases where it might be held to apply, is apologized for by the writer of the opinion in the *Spelman* case:

"While at first blush, the rule that the contributory negligence of a bailee cannot be imputed to a bailor when suing a third person for injuries to property, may seem unjust; yet, *when the rule is confined to those bailments which do not involve any privity of contract or agency between the bailor and bailee,* it would not appear to be so harsh and unreasonable as might be supposed."

So much for the law of the case as it arises out of the contract made by the parties and under which the machine was used at the time of the accident.

As I read the record, the facts will not sustain the holding of the majority or the verdict of the jury that Colley was not engaged in the prosecution of respondent's business, or that he was not his agent or his servant, and that he was using the car merely for his own pleasure and was, therefore, a gratuitous bailee.

Colley, having the use of the machine as against any right to interfere on the part of the respondent, drove out on a Sunday afternoon in company with a young lady whom he intended to take to her home. While traveling over the country, it occurred to him that a shipment of liquor which, as the law then was, must be obtained on a permit and then only at stated intervals, was about due. The liquor had been ordered by the respondent and was shipped in his name. Colley went out of his way, out of the path of pleasure, to go to the station. He had on other occasions gone to the same place to receive like shipments for respondent. He inquired of the agent whether a package had been received for respondent. Being notified that the package was at the depot, he receipted for it in respondent's name and undertook to carry it home. There was no express direction on the part of respondent to Colley to bring this particular shipment, but it was Colley's habit and his custom to go to the depot without specific direction and receive such shipments for respondent from time to time. Respondent himself testifies:

"Q. He had on other occasions stopped at the station and got packages of this character for you? So, it was understood that there was no objection on your part to his getting it out and bringing it home? A. No, sir; I didn't object. Q. It was perfectly agreeable with you that he stop and bring the package home, if he happened to be there? A. It was all right. Q. In fact, it would save you the trip, if it was there, and

he could bring it out for you? Is that the idea? A. Not necessarily the trip; no, sir. Q. What distance is it from your place to the station? A. About two miles. Q. He had to go for it if you didn't bring it out? Somebody has to get it? A. Yes, sir. Q. And after you had found out on this particular day he had received this package for you and signed for it in your name you made no objection at all? A. No, sir. Q. It was perfectly satisfactory to you? A. Yes, sir. Q. When you found out that he received your package and was taking it out, you made no objection, and it was perfectly satisfactory to you that he might bring it out? A. Yes. Q. While you had not instructed Mr. Colley to get any packages for you, he had from time to time brought packages out for you, and it was agreeable to you that he should do that? A. I had no objection to anybody bringing them out to me. Q. And he had done it before? A. He had probably, but I don't remember it. Q. And it was perfectly agreeable that he should get this particular package and bring it out? A. I had no objection. Q. You made no objection after you found out that he had the package on that particular day? That was perfectly satisfactory to you that he should bring it out? A. I didn't make any objection."

This testimony clearly discloses that, aside from all other questions in the case, Colley was engaged in his master's business; and whether under an implied or express authority, his act was ratified so as to put it beyond the power of the respondent to disaffirm his negligence and recover in this case. The liquor was received by Colley, who signed the name of respondent, and respondent says that his act was "perfectly satisfactory" to him. The testimony of the respondent is corroborated by that of Colley, the driver of the machine.

For these reasons, I believe that the judgment should be reversed and the cause dismissed.

[No. 14997. Department Two. May 14, 1919.]

HOLLY-MASON HARDWARE COMPANY, *Respondent*, v. NATIONAL SURETY COMPANY, *Appellant*, BOYAJOHN-ARNOLD COMPANY, *Defendant*.[1]

STATES (20-1) — CONTRACTOR'S BONDS—MATERIALMEN—COMPLAINT. A complaint by a materialman upon a contractor's bond on state work is sufficient where it alleges that the materials were furnished and delivered by plaintiff for and were used in the erection of the building.

SAME (20-1)—CONTRACTOR'S BONDS—CLAIMS—NONLIENABLE ITEMS. The inclusion of nonlienable items in a materialman's notice and claim against the bond of a contractor on state work is not fatal, where they were inserted by mistake and were inconsiderable in amount and easily separable.

SAME (20-1)—CONTRACTOR'S BONDS — MATERIALS — DELIVERY—EVIDENCE. Under Rem. Code, §§ 1159-1161-1, giving materialmen a right of action upon the bonds of contractors on public work for materials furnished or provisions supplied in carrying on the work, it must be shown that the materials were either furnished on the ground or actually used in the construction; hence an action must fail as to items delivered through a common carrier to a station over two miles from the work, unless it be shown that they were actually delivered on the ground or used in the building.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered March 5, 1918, upon findings in favor of the plaintiff, in an action on contract, tried on the merits to the court. Reversed.

C. B. White and *Merritt, Lantry & Merritt*, for appellant.

J. B. Campbell, J. D. Campbell, and *Henry L. Kennan*, for respondent.

[1]Reported in 180 Pac. 901.

FULLERTON, J.—This is an action upon a surety bond given by a contractor to secure the performance of a public work. The record shows that the Boyajohn-Arnold Company contracted with the state of Washington to construct for the use of the state certain public buildings, and that the appellant National Surety Company became surety upon its bond, given pursuant to the provisions of § 1159 of the code. The respondent is a hardware dealer and, during the course of the construction of the building, sold to the contractor certain hardware alleged to have been used in the construction of the building. The contractor did not pay for the materials so sold to it, and the respondent, to charge the surety, served on the state a notice of claim against the surety, attaching thereto an itemized list of the articles claimed to have been furnished the contractor. The notice showed a balance due of $876.24, and to recover this sum the present action was instituted.

The surety company alone defended. Its answer was in effect a general denial. After the service of the answer and before trial, the respondent served upon it a written statement to the effect that certain of the items included in its notice of claim were not properly chargeable against the bond, that they were included by error, and that at the trial the respondent would not attempt to hold the surety company liable therefor. Attached to the statement was a list of the several items, their aggregate value being $73.06.

At the commencement of the trial, the appellant moved for its dismissal, basing its motion upon the grounds that the complaint did not state facts sufficient to constitute a cause of action, and that the respondent had so commingled lienable and nonlienable items in the notice of claim as to render the claim

void and nonenforceable. The motion was overruled, whereupon a trial on the merits was had, which resulted in a judgment in favor of the respondent for the sum of $715.80.

In this court, the appellant assigns as error the refusal of the court to dismiss the action upon its motion therefor, made at the opening of the trial of the cause. This motion was properly denied. The complaint, after alleging the contract between the contractor and the state for the construction of the building, further alleged that the materials for which payment was demanded were "furnished and delivered to Boyajohn-Arnold & Co. [the contractor] for carrying on the work of the erection of said building described in paragraph two hereof, and were used in the erection thereof." This was sufficient.

In support of the second branch of the motion, the appellant cites the instances where this court has held liens to be void which so far intermingled lienable and nonlienable claims as to be incapable of separation, and in which the claimant has wilfully inserted in the claim of lien lienable and nonlienable items. But, conceding the applicability of the rule of the cases cited to the case in hand, the rule is not fatal in this instance. The nonlienable items formed an inconsiderable part of the whole, were easily separable from the lienable items and were not wilfully inserted, but were inserted by inadvertence or mistake. The cases cited, as well as others from this court, recognize these distinctions and hold liens valid when filed in good faith, even though they may contain nonlienable items.

The further contention is that the evidence was insufficient to justify the judgment; the more precise objection being that it was neither shown that the materials sold the contractor upon which the claim is

founded, were actually used in the construction of the building, nor delivered on the ground for use therein. The testimony as to the delivery of the materials was in substance this: The place of business of the respondent was in the city of Spokane, some distance from the place where the buildings were being constructed. The goods were ordered by the contractor in varying quantities and at different times during the progress of the work. As the orders were received, the respondent delivered the materials ordered to a common carrier, sometimes a railroad company and sometimes an express company, for transportation to the shipping station nearest the site of the building, some two and one-half miles therefrom, from which place they were receipted for to the carrier by the contractor or someone on its behalf. The actual receivers of the goods were usually draymen or their employees, and the respondent was unable to show that more than a small quantity of them actually reached the building. The question, therefore, is whether this is such a delivery as will charge the bondsman of the contractor.

The statute relating to bonds of contractors undertaking a public work is found at §§ 1159-1161-1 of the code (Remington's). It provides that such bonds shall be conditioned for the faithful performance of the work by the contractor and for the payment by him of "all laborers, mechanics and subcontractors and materialmen," and all persons who shall supply the contractor "with provisions and supplies for carrying on such work." A subsequent section gives to such persons "a right of action in his, her or their own name or names on such bond for work done by such laborers or mechanics, and for materials furnished or provisions and goods supplied and fur-

nished in the prosecution of such work." It will be observed that the statute does not in terms make use in the building a necessary prerequisite to a right of recovery on the bond for materials furnished, nor does it make delivery on the ground such a necessary prerequisite. This court has held, however, in construing a statute with similar provisions of which the present statute is but amendatory, that one or the other of such conditions must be shown before a recovery can be had. In *Gate City Lumber Co. v. Montesano,* 60 Wash. 586, 111 Pac. 799, this language was used:

"The question then arises, who is a materialman, and what is a just debt incurred in the performance of contract work, within the meaning of the act of 1909. In the case of *Fuller & Co. v. Ryan,* 44 Wash. 385, 87 Pac. 485, we held that a materialman could not claim a lien for material which was neither used in the building nor delivered on the ground for use therein. See, also, *Foster v. Dohle,* 17 Neb. 631, 24 N. W. 208; *Weir v. Barnes,* 38 Neb. 875, 57 N. W. 750. We are not disposed to place a broader construction on the term *materialman,* and *just debts incurred in the performance of contract work,* under this statute. A more liberal construction would permit of the grossest frauds on the part of contractors, and is not necessary for the protection of *bona fide* materialmen. It appears from the testimony in this case that at least three different lumber concerns furnished material to be used in this roadway, and if a materialman brings himself within the terms of the statute by simply loading lumber on the cars at a distant point and billing it to the contractor without more, it can readily be seen that the contractor can mulct the city, or the sureties in case a bond is given, for the value of material many times in excess of the requirements of his contract."

The distinguished judge writing the opinion quoted, in support of the conclusion reached, the following

from the case of *Foster v. Dohle,* 17 Neb. 631, 24 N. W. 208:

"But it will not be seriously contended that the mere fact that the owner enters into a contract with a builder to erect or repair a building authorizes the builder to go to every lumber yard in the city and every hardware store and purchase from each a sufficient quantity of material for the erection or repair of the building in question, and make the owner of the building liable therefor. If all this material was delivered by the materialmen at the building, and they acted in entire good faith, it is possible the owner might be liable, because the delivery of the material would be notice to him of the unusual quantity which was being furnished for which he might be liable. But that question is not before the court. The contractor, however, unless expressly constituted such, is not the agent of the builder, and cannot bind him by contracts for materials not put into the building or delivered at the same for use therein. As there is nothing to show that any of the material not allowed by the court below was delivered at or used in the building the owner thereof is not liable for the same."

The principle of this case seems to us now eminently just. The bondsman manifestly did not become surety for all the materials the contractor might purchase during the time he is actually at work upon the contract, regardless of the use made of the materials. But, since he may not be able to show that the materials furnished actually went into the structure, he is allowed the more liberal rule of showing that he delivered the material on the ground for use therein. This rule, as was said in the case cited, is sufficient for the protection of *bona fide* materialmen, while a more liberal rule might lead to the grossest of frauds.

The principle announced will bar a recovery in the present case, save for such material as was actually

delivered at the building. While it is clear from the evidence that some part of it was so delivered, we have found it difficult to segregate the proportion delivered from the remainder of the claim. The necessity for making such a segregation did not arise in the court below, owing to the view the trial court took of the governing principles of law, and this accounts, perhaps, for the obscurity of the evidence in this respect.

We have concluded, therefore, to direct a reversal and a remand of the cause, with instructions to ascertain what proportion of the materials sold the contractor were actually used in the construction of the building or were actually delivered on the ground for use therein. Either party at the hearing will have the privilege of introducing further evidence.

Reversed and remanded accordingly.

MOUNT, PARKER, HOLCOMB, and MAIN, JJ., concur.

[No. 15095. Department Two. May 14, 1919.]

EMMA WOMACH *et al., Respondents and Cross-Appellants,* v. AMANDA SANDYGREN, *Appellant,* HOLLAND BANK, *Intervener.*[1]

ABATEMENT AND REVIVAL (11)—ANOTHER ACTION PENDING—DEMURRER. A complaint is not demurrable on the ground that another action is pending, where the fact does not appear on the face of the complaint.

JUDGMENT (227, 229) — CONCLUSIVENESS — MATTERS NOT IN ISSUE. Where, in a former action, the court denied relief on account of rents received prior to 1916 because not involved therein, the former judgment is not a bar to an action for rents for the year 1915.

TENANCY IN COMMON (7, 11-1)—RENTS AND PROFITS—ACCOUNTING. Where one tenant in common farmed parts of the land, claiming it as her own, excluding her cotenants and refusing to pay any part of the proceeds, she is liable to an accounting for the profits.

[1]Reported in 180 Pac. 922.

SAME (8)—REPAIRS AND IMPROVEMENTS. Pending receivership litigation for the partition of common property, a tenant in common makes repairs and improvements at her peril, and cannot offset the same against an action for profits, where they did not enhance the value of the property.

JUDGMENT (222)—CONCLUSIVENESS—MATTERS LITIGATED AND DETERMINED. The liability of a tenant in common to share in the payment of a mortgage litigated and determined in a partition suit is concluded and cannot be again raised in an action for an accounting between the same parties.

TENANCY IN COMMON (7)—RENTS AND PROFITS. In an action for an accounting of profits received by a tenant in common who farmed the land, rentals should be based upon one-third of the crop, where that was the custom in that country for lands of that kind.

SAME (7). In an action for an accounting of profits received by a tenant in common who farmed the land, he should be required to account for a crop at the price at which it was actually sold.

Cross-appeals from a judgment of the superior court for Lincoln county, Sessions, J., entered March 29, 1918, upon findings in favor of the plaintiff for rent, in an action tried to the court. Affirmed.

Martin & Jesseph, for appellant.

G. E. Lovell, for respondents.

MOUNT, J. — This action was brought to recover against Amanda Sandygren rent for the year 1915 upon farm lands owned in common by the parties hereto. The Holland Bank intervened as a party plaintiff. Upon issues framed, the case was tried to the court without a jury, and resulted in a judgment in favor of Emma Womach for $783.77, with interest at the rate of six per cent from November 1, 1915; in favor of Anna Salt, for $699.80, with interest at the same rate from the same date; and in favor of the intervener for $91.97, with interest from the same date. The defendant, Amanda Sandygren, has appealed from that judgment. The plaintiffs, Emma Womach and

Anna Salt, have cross-appealed. The Holland Bank has not appealed.

The parties to the appeal will therefore be designated as appellant and cross-appellants.

The appellant contends, first: that the trial court committed error in overruling her demurrer to the complaint and in refusing to dismiss the action at the close of the cross-appellant's evidence, because another action was pending between the same parties in relation to the same subject-matter. It is sufficient to say, upon the demurrer, that the complaint did not show upon its face that there was another action pending between the parties. The court, therefore, properly overruled the demurrer.

Upon the trial, it appeared that, in the year 1916, an action was brought by these cross-appellants for partition of certain farm lands in Lincoln county; that the appellant, Amanda Sandygren, was at that time claiming to own the larger part of these farm lands. After that action was brought, a receiver was appointed to take charge of the lands and collect the rents accruing thereon pending the litigation. Mrs. Sandygren appealed from the order appointing the receiver, gave a *supersedeas* bond, and kept possession of the property. After the appeal had been determined in this court, affirming the order appointing the receiver (*Womach v. Sandygren*, 94 Wash. 256, 162 Pac. 354), a citation was issued directing Mrs. Sandygren to turn over the property to the receiver. The court then concluded that the rents which had accrued, and which had been received by Mrs. Sandygren prior to the commencement of that action, were not involved therein, and refused to require Mrs. Sandygren to turn over to the receiver the rents or to account therefor prior to the year 1916. Thereupon this action was brought for an accounting of the rents for the year 1915. So

it is apparent from the facts, as they appear in the record, that the action pending between the appellant and the cross-appellants at that time did not involve the rents for 1915. There was, therefore, no action pending between the same parties upon the same subject-matter; and we are of the opinion that the trial court properly denied the motion to dismiss the action.

Appellant next contends that the trial court allowed a recovery for rents upon two pieces of property from which she had never received any of the rents. There is some dispute in the evidence upon this question. The trial court, after hearing the evidence, concluded that the appellant had received rents for these pieces of property for 1915 and required an accounting therefor. We think the evidence justified the court in so finding.

It is next argued that the court erred in permitting any recovery against the appellant for rents for the year 1915, because the property was common property and the parties were cotenants, and therefore the cross-appellants had the same right to farm the lands or lease the lands that the appellant had; and for that reason there could be no recovery. A number of cases are cited to the effect that a cotenant may not be held for rents and profits where such cotenant has not denied the right of other cotenants to share in the profits. The rule is stated in 38 Cyc., page 63, as follows:

"A tenant in common, while merely in possession of the common property, not excluding his cotenants, nor denying them equal enjoyment, cannot be charged with rent for use and occupation, and where a tenant in common does not claim more than his proportionate share, and does not receive rents or profits for more than said share, and does not prevent his tenant in common from occupying the property or receiving or enjoying his proportionate share of the rents and

profits, his cotenant is not entitled to recover from him any parts of such rents or profits received. But a cotenant may be held liable where there is a statute or an agreement express or implied to that effect, or where the relation of the cotenant solely occupying the whole of the common property is fiduciary, and where the common property is occupied adversely, or to the exclusion of the other common owners, by some of the cotenants, those so occupying are liable for so much of the rental value and the value of the profits thereof as exceed their proportionate share."

We think it fairly appears from the record here that the appellant, in the year 1915, was claiming the larger part of the common property as her own and was excluding her joint tenants from farming the land or from collecting the rents, and she refused to pay to her cotenants any part of the proceeds for the year 1915. We are of the opinion, therefore, that she was liable under these circumstances for the proportionate share of the rents collected for that year upon common property. *Eckert v. Schmitt,* 60 Wash. 23, 110 Pac. 635; *Daniel v. Daniel,* 106 Wash. 659, 181 Pac. 215.

It is next claimed by the appellant that the trial court failed to give the appellant credit for certain expenses and repairs made upon the property. It appears that these expenses and repairs were made pending the receivership litigation wherein the cross-appellants were then litigating the question of partition with the appellant. Under these circumstances, of course, such expenses as were put upon the property were put there at appellant's peril and should not be allowed where it is not shown that these expenses and repairs enhanced the value of the property. It is not so shown in this case. At any rate, the trial court so concluded from the evidence.

Appellant next argues that the cross-appellants should be required to share in the payment of a mort-

gage which was paid by the appellant. That question was litigated and determined adversely to the appellant in the partition suit hereinabove mentioned, and it follows, of course, that she may not again litigate that question.

The cross-appellants argue that the trial court erred in making an accounting based upon one-third of the crops produced upon the common property as the rental value. The cross-appellants claim that the court should have required the appellant to account for one-half the crops produced as the rental value of the land. We think the evidence very clearly shows that the common custom for rental in that country for lands of this kind was one-third of the crop produced upon the land and not one-half. The trial court therefore committed no error in allowing the customary rental and requiring an accounting upon that basis.

Cross-appellants also contend that the court should have required the appellant to account for the portion of the crops received as rental at the highest value for which it could have been sold. The trial court required an accounting for the price at which the crop was actually sold. It is apparent that this was just and fair. There was no bad faith attached to the appellant in collecting the rent except that she was claiming that the land and rental belonged to her as a matter of right.

We are satisfied, upon the whole record, that the judgment appealed from was fair and just to all the parties and it is therefore affirmed.

Neither party will recover costs on this appeal.

Chadwick, C. J., Holcomb, Parker, and Fullerton, JJ., concur.

[No. 15096. Department One. May 14, 1919.]

FIRST SECURITY & LOAN COMPANY, *Appellant*, v. GERTRUDE S. ENGLEHART, *Executrix and Trustee of the Estate of Ira P. Englehart, Respondent.*[1]

STATUTES (75)—CONSTRUCTION—CODES. The Law of 1917, p. 642, designated as "Probate Code" being a complete and comprehensive act on the subject-matter of its title, its sections are *in pari materia*, and must be harmonized and construed together.

EXECUTORS AND ADMINISTRATORS (72)—CLAIMS—NECESSITY. The statute of nonclaim, Laws 1917, p. 673, § 107, is mandatory and requires that claims against estates be presented within six months.

SAME (72)—CLAIMS—NECESSITY—UNDER NONINTERVENTION WILLS. Creditors of estates under nonintervention wills must present claims, in view of the Probate Code, Laws 1917, p. 666, § 92, requiring such executors to give notice to creditors and to pay claims within one year thereafter, and Id., p. 673, § 107, requiring every executor to give notice to creditors to present claims within six months, and barring all claims not so presented.

SAME (81)—CLAIMS—STATEMENT AND VERIFICATION. Under Probate Code, Laws 1917, p. 673, § 108, requiring every claim filed to be supported by affidavit, an unsupported claim is ineffectual.

Appeal from a judgment of the superior court for Yakima county, Taylor, J., entered August 5, 1918, upon findings in favor of the defendant, in an action on a claim against an estate. Affirmed.

Richards & Fontaine, for appellant.

Riggs & Venables, for respondent.

MITCHELL, J.—On June 30, 1916, Ira P. Englehart gave his note for $14,370 to the First National Bank of North Yakima. To secure its payment, he deeded to plaintiff, First Security and Loan Company, two pieces of real property, and assigned to it thirty shares of the capital stock of the Klickitat & Simcoe Irrigation Com-

[1]Reported in 181 Pac. 13.

pany. A trust agreement in writing was entered into at the same time, whereby it was agreed that plaintiff should hold title to the property to protect and secure the indebtedness due the bank. It gave plaintiff the right to sell the property at such price as it deemed advisable at any time the bank considered it necessary. It provided that, if the proceeds of sales of the property were not sufficient to pay the debt, Englehart was obligated to pay the balance. Englehart died on December 8, 1916, leaving a nonintervention will, by which he devised all his property to his wife, Gertrude S., and their two children. The will was admitted to probate by the superior court of Yakima county on December 12, 1916, and Gertrude S. Englehart, nominated therein as executrix, was duly appointed and on the same day qualified as executrix. On December 15, 1916, for the purpose of making proof of the solvency of the estate, the attorney for the executrix requested and received from the bank a statement of the Englehart indebtedness. The statement was not verified. No other statement of the claim was ever presented to the executrix or her attorney. Pursuant to an order of the superior court, she gave due and proper notice to creditors, the first publication of which was on December 18, 1916. In January, 1917, a part of the property held in trust was sold, with the written consent of the executrix, and the proceeds applied on the note. Thereafter, on February 23, 1917, May 25, 1917, August 10, 1917, and November 7, 1917, the executrix made payments on the note at the bank and was at all times familiar with its face value.

After December 18, 1917, the time within which creditors were allowed to present their claims having expired, the bank was notified that, because of its failure to present a duly verified claim, the estate would not be responsible for any amount and that it must look

only to the property held in trust to secure the payment of the note. Thereupon the bank assigned its rights and transferred the note to plaintiff, which brought this action demanding judgment against the executrix as such for the amount due on the note; that the trust property remaining on hand be sold and the proceeds applied on the amount found due; and that the deficiency, if any, be declared a just and valid claim against the estate. Upon a trial, the court made findings and conclusions, and entered judgment favorable to plaintiff except that it was not entitled to have the amount due on the note allowed as a claim against the estate, but that it must look solely to the security held by it for the satisfaction of the debt.

Plaintiff has appealed from that portion of the judgment denying it a judgment against the estate, or the defendant as executrix thereof, other than the right to have the trust property sold and the proceeds applied to the payment of the debt.

Appellant states the appeal presents only two questions:

"First, was it necessary under the existing status of our probate law to present the claim to the executrix who was administering the estate under a nonintervention will. Second, if presentation was required, what was necessary to constitute such a presentation as would establish the debt as a valid claim against the estate."

As to the first proposition, it will be observed that the probate code of 1917 became effective about the middle of the year within which creditors were notified to present their claims in this estate. Insisting there is a difference in the 1917 law, as compared with the law prior thereto, with respect to the matter of the presentation of claims where the estate is being administered under a nonintervention will, appellant con-

tends the later law controls in this case. The difference between the pertinent portions of the old and of the new statute concerning nonintervention wills is, that, whereas the prior law (Laws of 1897, page 285, § 1, same being § 1444, Rem. Code) provides:

"That in all such cases the claims against such estates shall be paid within one year from the date of the first publication of notice to creditors to present their claims, unless such time be extended by the court, for good cause shown, for a reasonable time: . . .;"

the present law (probate code of 1917, § 92, ch. 156, page 666, Laws of 1917) provides:

"It shall not be necessary to take out letters testamentary or of administration, except to admit the will to probate and to file a true inventory of all the property of such estate and give notice to creditors and to the state board or person having charge of the collection of inheritance tax, in the manner required by existing laws."

This court, in the case of *Foley v. McDonnell,* 48 Wash. 272, 93 Pac. 321, upon quoting the provisions of the nonintervention will statute of 1897 with reference to notice to creditors to present claims, and the statute requiring creditors to present their claims, said:

"These two provisions last above quoted seem to make it clear that, in cases of nonintervention wills, creditors shall present their claims within one year of the publication of notice, and failure so to do bars such claim the same as in other classes of wills. It is true this court held otherwise in *Moore v. Kirkman,* 19 Wash. 605, 54 Pac. 24, and possibly in other cases. But these cases arose under the statute before 1897, when the amendments above quoted were made to the statute in force at that time. Under the present statute, we are of the opinion that it is the duty of the executor, under wills like the one in question, to publish a notice to creditors, and failure of the creditors to file a claim within the year bars such claim."

Discussing the probate law of 1917, counsel for appellant notices that subdivision 13 of it is devoted to "settlement of estates without administration," contains the section with reference to nonintervention wills, and has no provision directing creditors to present their claims; and makes the argument that this subdivision seems, and apparently is intended, to be complete in itself and to contain all the law governing the administering of estates under nonintervention wills.

We are not convinced by the argument. The law of 1917 (p. 642) is designated "Probate Code," and entitled: "An Act to establish a code of probate law and procedure, including the making and probating of wills, administration of estates of deceased persons; etc." It consists of 223 sections, and besides a portion designated "General Provisions," it has 23 subdivisions; being altogether a complete and comprehensive act upon the subject-matter of its title. The whole constitutes a general system which must be respected as such in all attempts at construction. The sections and subdivisions are *in pari materia* and, by the well-established rule, must be harmonized, read, and construed together, thus forming a complete statutory structure enacted all at the same time. *State ex rel. Miller v. Griffin,* 46 Wash. 489, 90 Pac. 661; 2 Lewis' Sutherland, Statutory Construction (2d ed.), p. 847.

Section 107 of the probate code of 1917 (p. 673) requires that:

"*Every* executor . . . shall, immediately after his appointment, cause to be published . . . a notice to the creditors of the deceased, requiring all persons having claims against the deceased to serve the same on the executor . . . or his attorney of record, and file [the same] . . . within six months after the date of the first publication of such notice. . . . If a claim

be not filed within the time aforesaid, it shall be barred."

This statute is but a repetition of the prior law as found at §§ 1470 and 1472, Rem. Code, except that formerly a creditor had a year in which to present his claim. Such statute of nonclaim is mandatory. *Empson v. Fortune*, 102 Wash. 16, 172 Pac. 873, and cases cited; *In re Parkes' Estate*, 105 Wash. 586, 178 Pac. 830.

Counsel for appellant, contending for the negative as to each, the necessity for presenting a claim and the necessity for its verification in the case of a nonintervention will, relies upon numerous Texas cases and the early case of this court of *Moore v. Kirkman*, 19 Wash. 605, 54 Pac. 24. Obviously, they are not in point because our present statute differs from the statutes those cases construed. The statute of Texas provides:

"Any person capable of making a will may so provide in his will that no other action shall be had in the county court in relation to the settlement of his estate than the probating and recording of his will, and the return of an inventory, appraisement and lists of claims of his estate." Art. 1995, Revised Statutes of Texas, 1895; Vernon's Sayles' Texas Civil Statutes, 1914, Vol. 2, art. 3362.

It is to be observed that the Texas statute makes no provision for notice to creditors. Our statute, prior to 1897, which was § 955, vol. 2, Hill's Code, was to the same effect as the Texas statute, which accounts for the rule of *Moore v. Kirkman, supra*, as remarked by this court in the case of *Foley v. McDonnell, supra*.

So that, if we consider this case in the light of the 1917 statutes with reference to administering estates under nonintervention wills, notice to creditors, and the necessity for presenting claims, or the similar statutes in force just prior thereto, it necessarily fol-

lows there was necessity for the appellant to present its claim to the executrix prior to the expiration of one year from the date of the first publication of her notice to creditors.

Appellant's second point is important because only an unsworn statement of the claim was furnished by the bank. We have seen that the statute at all times since 1897 required *every* executor to give notice to creditors to present their claims. By § 108 (p. 673) of the probate code of 1917, "every claim served and filed," and by the prior law, Rem. Code, § 1473, "every claim presented," is required to be supported by the affidavit of the claimant that the amount is justly due, no payments have been made thereon and there are no offsets to the same. To declare that there may be a proper presentation of a claim against an estate without its being supported by the affidavit of the claimant would at once nullify the law. This court, in the case of *Empson v. Fortune, supra,* in writing on this subject, after stating that the claim there involved was not supported by the oath of any one as required by the statute, and that it was contended the obligation was not such as is required to be supported by affidavit upon its being presented to an executor, and that it was further contended the executors had waived formal presentation of the claim, gave a list of cases of this court effectually answering those contentions, and said:

"By these decisions it has become the settled law of this state that the *proper* presentation of a claim is a fact to be proven essential to the cause of action, and that an executor or administrator cannot, because of the mandatory provisions of our claim statute, waive such presentation so as to estop himself from defending upon the ground of want of such proper presentation."

Again, in the case of *Ward v. Magaha,* 71 Wash. 679, 129 Pac. 395, this court said: "Claims against estates

are collectible under the statute, and not otherwise." The statutes are plain. A claim must not only be presented, but it must be supported by affidavit.

Judgment affirmed.

CHADWICK, C. J., TOLMAN, MACKINTOSH, and MAIN, JJ., concur.

[No. 15106. Department Two. May 14, 1919.]

W. N. PATE *et al., as Executors, etc., Respondents,* v. HENRY PETERSON *et al., Appellants.*[1]

STATUTES (86, 91)—CONSTRUCTION—RETROACTIVE OPERATION—REMEDIES. A prior action at law to establish existing water rights, is not affected by the water code, Laws 1917, p. 447, § 1, which saved all existing rights of the state and provided that nothing therein shall affect existing rights of any riparian owner.

WATERS AND WATER COURSES (37, 59)—DIVERSION—PRESCRIPTIVE RIGHTS—USE OF DITCH FOR IRRIGATION. Plaintiff's evidence sufficiently establishes his prescriptive rights to the use of a ditch on adjoining lands to convey waters for irrigation, where it appears that adjoining owners of riparian lands jointly built the ditch and used the same to convey surplus waters, all doing an annual share of the work on the ditch and equally using the water according to their respective needs for a period of over twenty-four years.

Appeal from a judgment of the superior court for Okanogan county, Neal, J., entered April 20, 1918, awarding to the plaintiffs the right to certain waters for irrigation, after a trial on the merits to the court. Affirmed.

Lee & Kimball, for appellants.

P. D. Smith, for respondents.

HOLCOMB, J.—Respondents, claiming an undivided one-third interest in the waters of Libby creek, a small watercourse in Okanogan county, brought ac-

[1]Reported in 180 Pac. 894.

tion to establish and quiet their title to the same, together with a like interest in a ditch across the land of the appellants from the creek to the land of the respondents, and to enjoin interference with the water right and ditch by the appellants.

Decree was for respondents, adjudicating them to be entitled to a water right for thirty acres of their land, requiring delivery at the north line of their land of thirty miners' inches of water, under a four-inch head, during the entire irrigating season, from April 15 to October 1, annually, and enjoining interference with their water right and ditch.

The case being of equitable cognizance, the court was not required to, and did not, make any findings and conclusions, and the case is before us on appeal to be determined *de novo*. Appellants objected to the trial by the court, and later applied to require the state hydraulic engineer to intervene, on the ground that the new water code, chapter 117, Laws 1917, p. 447, gave to the state hydraulic engineer the power, and imposed upon him the duty, of regulating and controlling the diversion of waters and determining water rights. This objection and the application were denied by the court.

Section 1, chapter 117, Laws 1917, p. 447, is as follows:

"The power of the state to regulate and control the waters within the state shall be exercised as hereinafter in this act provided. Subject to existing rights all waters within the state belong to the public, and any right thereto, or to the use thereof, shall be hereafter acquired only by appropriation for a beneficial use and in the manner provided and not otherwise; and, as between appropriations, the first in time shall be the first in right. Nothing contained in this act shall be construed to lessen, enlarge, or modify the existing rights of any riparian owner, or any existing

right acquired by appropriation, or otherwise. They shall, however, be subject to condemnation as provided in section 4 hereof, and the amount and priority thereof may be determined by the procedure set out in sections 14 to 26 inclusive hereof."

Section 11 specifically authorizes the *Attorney General* to appear in any litigation pending at the time of the law taking effect.

It is asserted by appellants that it is fundamental that this law could not take away any existing rights, and that the court confused that idea with the administration of the act itself; that the right to the use of the waters involved by the respective parties had never been judicially determined, and that the mere bringing of the present suit before the water code went into effect did not in any way give any party a right which he did not have. It is apparent, however, that the water code, by § 1, saved all existing rights to waters within the state, and that nothing contained in that act should be construed to "lessen, enlarge or modify the existing rights" of any riparian owner or appropriator. Disregarding any question of the adjudication of rights not then vested by decree or otherwise, which is not to be determined here, this action was begun to establish and adjudicate by judicial decree alleged existing rights in and to certain waters, of which proceeding the court acquired jurisdiction prior to the taking effect of the water code, and in any event would be required to retain jurisdiction until final determination. The water code, unless it could sweep away all existing causes of controversy and wipe out the subject-matter, could not divest the superior court of jurisdiction of cases of which it had then acquired jurisdiction of the person and subject-matter involved. The trial court was therefore correct in his rulings.

Upon the merits of the case, appellants insist that the court erred in rendering a decree in favor of respondents, and contend that the evidence did not justify such decree, or any decree in favor of respondents, but required an adjudication in favor of appellants.

The lands involved are three adjoining ranches, lying along the west bank of the Methow river; the first, or upper ranch, being known as the "Libby Ranch," now owned by appellant Culvert Realty Company; the second, the "Risley Ranch," now owned by the appellants; and the third, the "Simmons Ranch" now owned by the respondents. The ranch owned by the respondents was originally settled upon by a man named Hancock, in 1889, who abandoned it; and in 1890, one Simmons, a predecessor of respondents, settled upon the ranch and continued there until 1900, when he sold out. The respondents are the owners by mesne conveyance from Simmons. The Libby lands are riparian to Libby creek, the creek flowing through them to the Methow river. Appellants contend that they concede, and always have conceded, to respondents the right to take and use the surplus or waste waters of the stream, the consideration being the small amount of work required to maintain the ditch. While the evidence is somewhat conflicting, there is competent testimony to the effect that the owners of these three ranches commenced the construction of a joint irrigation ditch in the year 1889, and that by the year 1891 all of them had the water on their ranches; that thereafter they all did an annual share of the work on the ditch, and all equally used the water according to their respective needs until Mr. Culver acquired a portion of the land now owned by appellants in 1913.

During more than twenty-four years, it appears that the users of the water divided all of it with each other, rotating with one another at any time the water

became low, and that the quantities used became fixed to the extent claimed by respondents, during that time. Risley, one of the predecessors of some of the appellants, who denied the right of respondents to one-third of the water at the trial, is conclusively contradicted by an agreement entered into between him and Simmons, the predecessor of respondents, on July 5, 1894, wherein he agreed in writing with Simmons, acknowledging the right of Simmons to take water out of the ditch "at the flood-gates owned by the said Risley and the said Simmons," and agreed with Simmons that whenever he required water along the west branch of the ditch he would turn in, or cause to be turned in, "the water required by him exclusive of the water that is running in said west branch of said ditch," if any, and that he and Simmons would do equal shares of the repairs on the ditch as far as they used it. This agreement in writing, in addition to the evidence as to the inception of the water rights, almost conclusively establishes the right of respondents' predecessor Simmons to the water flowing in the ditch at its source, and not the mere waste or surplus waters, and that the ditch was a joint ditch established and maintained by both of them. The case is very like that of *Villa v. Keylor,* 93 Wash. 164, 160 Pac. 297, where we said:

"The evidence, we think, warrants the conclusion that for a period of some twenty years prior to the commencement of this action, each of the parties diverted from the creek and used upon their respective tracts of land substantially the same proportionate amount of water of the creek as is awarded to them by the decree in this action."

It was also contended in that case that the lower riparian proprietors had riparian rights which were

not affected by the appropriation and use of one-half of the water by the upper owner and user. We held that:

"The theory upon which the trial court so apportioned the water was that this continued use of the water by mutual consent ripened into a binding agreement between them as to the apportionment of the water, though there may not have been an express agreement between them to that effect. That such a continual mutual diversion and use of all the waters for such period of time would become determinative of the rights of the parties touching the apportionment of the water seems plain as a matter of law, especially when such apportionment seems equitable, as it does in this case."

In the instant case, as in the foregoing, it is plainly a question of facts, and the facts not only do not preponderate against the decree of the lower court, as appellants contend, but necessarily preponderate in favor of respondents and the decree. It would be unnecessary to analyze the evidence in detail or to enter upon any lengthy discussion as to the law governing the question. It is practically controlled by the decision above quoted. Decree affirmed.

CHADWICK, C. J., MOUNT, FULLERTON, and PARKER, JJ., concur.

[No. 15183. Department One. May 14, 1919.]

AETNA CASUALTY & SURETY COMPANY, *formerly the Aetna Accident & Liability Company, Appellant,* v. LOUIS H. MOORE, *State Bank Examiner, Respondent.*[1]

STATES—PRIORITY OF STATE AS DEBTOR—WAIVER—LIQUIDATION BY BANK EXAMINER—STATUTES. Any right to a preference in the payment of claims against an insolvent bank which the state may have by virtue of its sovereignty or the common law of England is lost, where no claim therefor was made by the state prior to the time when the state bank examiner took charge under Rem. Code, §§ 3303-1 to 3303-19, which abolishes receivership and places the administration of insolvent banks in the hands of the state bank examiner; especially in view of the fact that the law authorizing the deposit of state funds in banks makes no provision for a preference by the state.

BANKS AND BANKING (7)—INSOLVENCY—POWERS OF EXAMINERS—PREFERENCE CLAIMS. Under Rem. Code, §§ 3303-1 to 3303-19, abolishing receiverships of insolvent banks and placing the administration in the hands of the state bank examiner, with power to determine the necessity and amount of assessments and to liquidate its affairs, the state cannot claim a preference on assets in the hands of the examiner, especially in view of § 3303-12, providing that, upon complete liquidation, proceeds shall be delivered to the stockholders, and the debtor bank is not revested therewith.

Appeal from a judgment of the superior court for King county, Allen, J., entered August 3, 1918, dismissing an action to recover preferred claims against an insolvent bank, upon sustaining a demurrer to the complaint. Affirmed.

J. Speed Smith, Henry Elliott, Jr., and *James B. Murphy,* for appellant.

M. M. Richardson and *Hugh C. Todd (F. C. Reagan,* of counsel), for respondent.

[1]Reported in 181 Pac. 40.

MITCHELL, J.—By the complaint, two alleged causes of action are set up. The first, in substance, is that the plaintiff was and is still engaged in carrying on, in this state, a general surety business; that the Northern Bank & Trust Company was, on and prior to January 30, 1917, conducting in the city of Seattle a general banking business; that the bank was a regularly designated depositary for the funds of the state of Washington; that the plaintiff became surety on the statutory bond of the bank as such depositary in the sum of $5,000; that the bond was duly approved by the state board of finance and in force on January 30, 1917; that, on January 30, 1917, the bank became insolvent and the defendant, as state bank examiner, took charge of the affairs of the bank and proceeded to close up its business as required by law; that, when it failed, there was on deposit with the bank state funds amounting to the sum of $30,000; that, after the insolvency of the bank was established and it was found to be unable to pay the state, the state made demand upon the plaintiff for its proportionate share of said deposits (there being other bonds given to protect the state), and the plaintiff, upon demand of the state, paid to it on February 24, 1917, in fulfillment of its surety obligation, the sum of $4,292.86; that the state thereupon assigned to the plaintiff its claim against the bank; that plaintiff thereafter filed with the state bank examiner having charge of the affairs of said bank a claim in which it claimed and demanded a prior right of payment over the general creditors of the bank upon the theory that the state, by reason of its sovereignty, possessed a prior right of payment, and that the plaintiff, upon reimbursing the state, became subrogated and succeeded to the right of the state to be first paid out of the funds of the bank before the general creditors received any dividend; and that the state bank examiner

rejected the claim of plaintiff as a preferred claim and allowed it only as a common one.

The second cause of action was in substantially the same form as the first, differing in that the plaintiff alleged that it became surety for the bank upon certain bonds executed and delivered to the treasurer of the city of Seattle, indemnifying the city against loss on account of deposits made by it with said bank; and that, after the bank was unable to repay the city moneys deposited with it, upon demand of the city, the plaintiff paid to the city, as surety upon said bond and not otherwise, the sum of $25,441.81, and that it filed a similar preferred claim with the defendant, which claim was rejected as such and allowed only as a common claim. The prayer of the complaint is that the claims be established as preferred claims.

The defendant interposed a general demurrer to each alleged cause of action. The court sustained the demurrer. Plaintiff elected to stand upon its complaint, and the court thereupon entered a judgment dismissing the complaint with costs, from which this appeal has been taken.

The questions of law involved are whether or not the state of Washington, by reason of its sovereignty and its qualified adoption of the common law, succeeded to and possesses a right corresponding to the prerogative of the crown of England to be first paid that was enforceable in this case; and if so, was the appellant subrogated to this preference right of payment upon satisfying the debts owing to, and taking assignments from, the state and the city? Of course it is admitted by appellant that the office of king and all prerogatives purely personal to him as such, being repugnant to our form of government, have been abrogated. But it is insisted that his sovereignty, powers, functions and duties, in so far as they relate to the maintenance of

civil government, are substituted by and devolve upon the people of the state; that they are not in conflict with any of our written law nor incompatible with our institutions of society; and that, inasmuch as claims or moneys due the king for the support and maintenance of the government, from whatever sources derived, were preferred over the claims of others, therefore, it follows such preference became and continues to be the law of this state, because of an act of the territorial legislature of 1863, now Rem. Code, § 143, which provides:

"The common law, so far as it is not inconsistent with the constitution and laws of the United States, or of the state of Washington, nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all courts of this state."

One of the prerogatives of sovereignty of the crown of England was the right to have its debts paid as against its subjects. Many of the American states have held that this attribute of sovereignty exists and is applicable here by virtue of constitutional law or legislative enactments adopting the common law, while other states have expressed and hold the opposite view. Among those declaring or favoring the rule, and collecting the cases, English and American, on both sides of the question, are *State v. Bank of Maryland,* 6 G. & J. (Md.), 205, 26 Am. Dec. 561; *In re Carnegie Trust Co.,* 206 N. Y. 390, 99 N. E. 1096, 46 L. R. A. (N. S.) 260; *United States Fidelity & Guaranty Co. v. Borough Bank of Brooklyn,* 213 N. Y. 628, 107 N. E. 1086; *Hoke v. Henderson,* 14 N. C. (3 Dev.) 12; and the recent case of *Aetna Accident & Liability Co. v. Miller,* 54 Mont. 377, 170 Pac. 760, L. R. A. 1918C 954.

Among those to the contrary, and collecting authorities on both sides, are *Freeholders of Middlesex County v. State Bank at New Brunswick,* 29 N. J. Eq. 268, af-

firmed by the court of errors and appeals, 30 N. J. Eq. 311; *Potter v. Fidelity & Deposit Co. of Maryland,* 101 Miss. 823, 58 South. 713; *Brown v. American Bonding Co.,* 210 Fed. 844, by the Circuit Court of Appeals for Montana prior to the case of *Aetna Accident & Liability Co. v. Miller, supra*; and the recent case of *Commissioner of Banking v. Chelsea Savings Bank,* 161 Mich. 691, 125 N. W. 424, affirmed on rehearing, 161 Mich. 704, 127 N. W. 351.

We may and shall assume, without deciding, that the common law in this respect is in force in this state, and yet we think the state or its assignee is not entitled to the preference claimed in this action, for the reason it was lost prior to the state or appellant, its assignee, making any attempt to assert it, as we shall later see.

In the case of *State v. Bank of Maryland,* 6 G. & J. (Md.) 205, 227, 26 Am. Dec. 561, an assignment case, in which the court confessed and declared the common law rule of priority of payment to the sovereign, it was said:

"That right in England is enforced by the process in the writ of extent in chief, or in aid, according to circumstances, and may be here, by proceedings known to our courts. But in either case, to make it available, the proceeding must be resorted to, before other vested rights to the property sought to be subjected to the claim are acquired."

Then, after discussing the English cases showing how the right may be lost, the court said (p. 229):

"We have endeavored to show that this is a fair and *bona fide* assignment for a valuable consideration, and passed the property from the bank, and beyond its power or control. If so, and a similar assignment in England has the effect to protect the property against the king's extent, and to defeat his priority (as we have seen it does), it has equally the effect here to

protect the property in the hands of the trustees against the common law priority of the state."

In the case of *Freeholders of Middlesex County v. State Bank at New Brunswick,* 29 N. J. Eq. 268, a receivership case, it was said:

"My judgment is, the state does not possess the prerogative claimed. But if my examination of the question had led me to a different conclusion, still, I think, the claim could not be sustained. The authorities of both countries unanimously agree that the right dies the moment the debtor's title is divested. No claim was made by the state in this case until after a receiver had been appointed. *That appointment invested him with full power to sell, assign and convey all the property of the corporation. . . . No act by the corporation is necessary to complete either the title of the receiver or that of his purchaser.* Unlike proceedings under bankrupt laws, no assignment by the debtor or commissioners is required. *Title is divested by force of law, and such divestiture is perfect and absolute.*"

The case of *State v. First State Bank of Las Cruces,* 22 N. M. 661, 167 Pac. 3, L. R. A. 1918A 394, was a case in which the state claimed a preference right to moneys in the hands of a receiver appointed to wind up the affairs of an insolvent bank in which the state had money on deposit. The court, assuming, without deciding, that the common law right of preference in favor of sovereignty existed, held that, upon the appointment of the receiver for an insolvent corporation, title to its property is divested and goes to the receiver, and that, therefore, when a receiver has been appointed for an insolvent state bank, the state is not entitled to a preference over the creditors.

In *State v. Foster,* 5 Wyo. 199, 38 Pac. 926, 63 Am. St. 47, 29 L. R. A. 226, the supreme court of Wyoming, in speaking of this prerogative, said:

"We do not care to decide this point, as it is unnecessary to do so. The assignment of the insolvent's property, both under common law and under our statute, passed the title, and no process could thereafter run against the property, *either that of the state or the citizen,* and the preference or prior right, if any existed, is thereby defeated."

The case of *Commissioner of Banking v. Chelsea Savings Bank,* 161 Mich. 691, 125 N. W. 424, 127 N. W. 351, was one wherein the state, through its commissioner of banking, claimed a preference because of a deposit on hand at the time of the failure of the bank. The commissioner of banking, after discovering the insolvency of the bank, had procured the appointment of a receiver under a law of Michigan which was similar, in this respect, to the law of this state as it existed prior to the act of 1915. In the opinion the court said:

"*Without treating the action of the banking commissioner in closing the Chelsea bank as the precise legal equivalent of a fair and bona fide assignment by the bank of its assets for a valuable consideration, it is nevertheless true that the proceedings taken passed all the property of the bank beyond its power or control. This, being the result of enforcement of the state law, should have an effect equal to an assignment for benefit of all creditors.* Such an assignment could not be avoided by the crown nor could it lay claim to goods seized by the sheriff on *fieri facias* and sold. *King v. Lee,* 6 Price, 369; *Giles v. Grover,* 1 Cl. & Fin. 72; *King v. Watson,* 3 Price, 6; 2 Tidd's Practice, pp. 1098, 1099; Chitty's Prerogative of the Crown, 281, 284, 285; *State v. Bank of Maryland,* 6 Gill & J. (Md.) 205 (26 Am. Dec. 561). The principle proceeded upon seems to be that the right of priority of the sovereign attaches, as does the right of any lienor, *only upon seizure under or enforcement of the proper writ. We do not hesitate to say that, assuming the right of priority contended for to exist in this state, the courts, in the absence of*

any assertion of the right by the state, and after the debtor has been divested of all control of its property in proceedings authorized by and following the statutes of the state, should not, sua sponte, assert the right in favor of a guarantor of the debtor."

However, as appellant rightly contends, this case does not arise upon receivership proceedings, nor upon an assignment by the bank, but upon the law of 1915, Laws 1915, p. 279 (Rem. Code, §§ 3303-1 to 3303-19), relating to the administration of banks and trust companies by the state bank examiner and the act of the bank examiner in taking charge of the affairs and property of the bank thereunder. The act of 1915 is a comprehensive one, and provides in detail for the powers and duties of the bank examiner. By § 10 (Id., § 3303-10) it abolishes the power of the courts to appoint receivers (authorized and directed by the former law), and prohibits the making of any deed of assignment for the benefit of creditors, except upon notice to the state bank examiner, unless in case of urgent necessity it becomes, in the judgment of the court, necessary to do so; in which cases the bank examiner may, within five days after service of such notice upon him, take possession of such bank or trust company, whereupon no further proceedings shall be had as to the appointment of a receiver or under the deed of assignment; and, in the event a receiver has already been appointed or the assignee commenced to discharge his duties, the appointment shall be vacated or the assignee removed and the state bank examiner proceed to administer the assets of the bank or trust company. The bank examiner is given power without the aid of any judicial inquiry, to determine both the necessity for and the amount of assessments on account of the superadded liability of the stockholders and to enforce collections of the same. *Hanson v. Soderberg,* 105 Wash. 255,

177 Pac. 827. By § 3 of the act, he is given dominion over all the property and business of the bank, with power to liquidate its affairs; and under the supervision of the superior court, he may compound bad or doubtful debts due, and with the approval of the court sell all real and personal property.

"And the state bank examiner, upon the terms of sale or compromise directed by the court, shall execute and deliver to the purchaser of such real or personal property such deeds or instruments as shall be necessary to evidence the passing of the title; . . ." Rem. Code, § 3303-3.

Keeping in mind the rule that all statutes of this nature ought to receive a fair and reasonable interpretation, according to the just import of their terms, we necessarily reach the same conclusion as that expressed in the case of *Commissioner of Banking v. Chelsea Savings Bank, supra,* viz:

"Without treating the action of the banking commissioner in closing the Chelsea bank as the precise legal equivalent of a fair and *bona fide* assignment by the bank of its assets for a valuable consideration, it is nevertheless true that the proceedings taken passed all the property of the bank beyond its power or control. This, being the result of enforcement of the state law, should have an effect equal to an assignment for benefit of all creditors. Such an assignment could not be avoided by the crown . . ."

There is this additional consideration which deserves notice: that the statute authorizing the deposit of state funds in banks was enacted prior to the bank examiner act of 1915, which contains no provision for retaining out of the funds of the insolvent bank moneys due the state in preference to other creditors of the bank. Our views concerning the relations of the bank examiner to the property and the loss of dominion over it by the

bank is further strengthened by subsequent sections of the act of 1915, to the effect that after the bank examiner shall have paid the claims of creditors and depositors and the expenses of administration, as provided for in § 11 (Id., § 3303-11) of the law, he shall call a meeting of the stockholders who shall determine if the bank examiner shall continue to wind up the affairs of the bank or if an agent, to be selected by them, shall complete the liquidation. In the event the latter plan is chosen, § 12 of the act provides:

"The state bank examiner shall *transfer* to such agent or agents all the undivided or uncollected or other assets of such bank or trust company then remaining in his hands; and upon such *transfer and delivery* the said bank examiner shall be discharged . . ." Rem. Code, § 3303-12.

Again, the statute provides that, whether the further liquidation be completed by the bank examiner or an agent, the proceeds shall be delivered to the *stockholders* in proportion to their several holdings, under directions of the court, thus presenting a situation, as shown by the whole act, by which the title to the property taken by the bank examiner, or the proceeds thereof, by force of the law never becomes revested in the *bank,* the former debtor of the sovereign. Thus, it appears we must of necessity reach a different conclusion in this case than that arrived at on this point in the receivership case of *Aetna Accident & Liability Co. v. Miller, supra,* so much relied on by appellant, the doctrine of which, in declining to interrupt enforcement of the preference admitted to exist in favor of the state, was expressly declared to rest in part upon the theoretical possibility that the insolvent debtor might regain control of the property.

Certainly, if there is no cause of action stated as to

the deposit by the state, there is none on account of that made by the city of Seattle.

For the reasons stated, the judgment is affirmed.

CHADWICK, C. J., TOLMAN, MACKINTOSH, and MAIN, JJ., concur.

[No. 15205. Department Two. May 14, 1919.]

RUDOLPH C. LANGE, *Respondent*, v. SPOKANE & INLAND EMPIRE RAILROAD COMPANY, *Appellant*.[1]

MASTER AND SERVANT (92, 170)—ASSUMPTION OF RISKS—QUESTION FOR JURY—SIGNALS. The assumption of risks by one employed in loading timbers on cars, injured through a sudden movement of the train without warning, is a question for the jury, where there was evidence of two witnesses who had worked only that day that it was customary to give signals by blasts of the whistle when the train was about to be moved.

SAME (76, 77)—FELLOW SERVANTS—SIGNALS. The giving of signals of the movement of a train is not, as a matter of law, a mere detail of the work that can be delegated to a fellow servant, where there was evidence that it was necessary for the protection of a crew loading timbers on the train as it was moved from pile to pile.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered June 14, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee in loading bridge timbers. Affirmed.

Graves, Kizer & Graves, for appellant.

Lee & Kimball, for respondent.

PARKER, J.—The plaintiff, Lange, commenced this action in the superior court for Spokane county, seeking to recover damages for personal injuries alleged to have been suffered by him from the negligence of the defendant railroad company while he was in its

[1]Reported in 180 Pac. 924.

employ assisting in the loading of bridge timbers on one of its work trains. Trial in that court sitting with a jury resulted in verdict and judgment in favor of plaintiff, from which the defendant has appealed to this court.

Appellant owns and operates an electric railway. At the time respondent was injured, he was employed by appellant, assisting in loading upon one of its work trains bridge timbers which had been left at short intervals along its main line track, in Whitman county. The train consisted of a motor and three flat cars. Upon the car next to the rear one, there was a derrick with a boom which could be swung out over the side of the train, and by means of tackle attached thereto, the timbers were lifted from the ground, swung over the cars either forward or to the rear of the derrick car, and lowered in place upon the cars. The running of the train was under the direct charge of an ordinary train crew consisting of a conductor, a motorman, and two brakemen, though they were to move the train to such places along the track as the loading foreman should direct, for the purpose of gathering up and loading the timbers. The loading crew consisted of the foreman, the operator of the derrick, and several workmen, of whom respondent was one. The train would be stopped opposite a pile of timbers, and the loading foreman would stand on the ground at the side of the train near the timbers to be loaded, and direct, principally by motions of his hands, the operation of the derrick; and also the movement of the train from one pile of timbers to another.

Respondent's duty, at the time he was injured, was to stand on and near the front end of the rear car just back of the main structure of the derrick, which placed

him entirely out of view of the motorman, and assist in putting the timbers into place upon the cars, as they were lowered by the derrick. Just before he was injured, the last one of the timbers of the pile then being loaded had been lowered into place upon the rear car, and the boom of the derrick again swung out as if to get another timber, the operator of the derrick seemingly not knowing that all of that pile had been placed upon the car. The foreman directed the derrick operator to swing the boom back over the car, with a view of moving the train backward to the next pile of timbers to be loaded. He then motioned to the motorman to so move the train. The train was started in compliance with his direction, no sound signal of any kind being given warning the workmen that the train was about to be moved. Respondent was then standing on the timbers very near the end of the car next to the derrick car, having just finished the placing of the last timber arriving upon the car, and not knowing that the train was about to be moved, lost his balance by reason of the train's sudden movement, and fell between the two cars, just outside of the rails of the track, receiving the injury for which he seeks recovery. As the boom came back over the car, respondent did not see the foreman direct the motorman to move the train. Indeed, the boom so obstructed his view that he could not have seen the foreman without making some special effort to do so. Respondent and one of his witnesses testified in substance, that it was the custom for the motorman to give two blasts of the whistle when the train was about to start ahead, or three blasts when the train was about to start backward, so that the workmen would have notice and could avoid the danger incident to starting the train. This testimony seems to be based

only upon the experience of these two witnesses during the several hours' work on that day prior to respondent's being injured, as it was the first day they had worked upon the train, though they had worked prior thereto elsewhere for appellant. One of appellant's witnesses testified that it was the custom in the movement of work trains to blow the whistle whenever the train is to be moved some considerable distance, say fifty feet or more, but not when the train is to be moved only a few feet, as in this instance.

It is first contended by counsel for appellant that respondent, by entering the employment he was in, assumed the risk of being injured in the manner he was injured; and that the trial court erred in refusing to so decide as a matter of law, in its denial of motions timely made asking that the case be taken from the jury upon that ground. The case was tried upon the theory that the question of respondent's assuming the risk of such an accident as resulted in his injury was dependent upon his right to rely upon the sound signals from the motorman to inform the workmen that the train was about to start forward or backward, the trial court instructing the jury upon the subject of assumption of risk, as follows:

"You are instructed that, if you find from the evidence that the defendant had adopted a method of operation of its train, requiring the giving of signals by the motorman, whether in response to signals received by him from the foreman or other employee of the defendant, which signals were given by the ringing of a bell or the blowing of a whistle, or in such other manner as would inform those engaged in work upon and about the train that the train was about to move either forward or backward, and that said method of operation was known to the plaintiff, and that the plaintiff relied upon the same, and if you further find from the evidence that, upon this occasion, no signal

was given, and if you find from the evidence that the plaintiff was injured by reason of the fact that no such signal was given, then I charge you that the plaintiff did not assume the risk of injury from the moving of the train without the giving of signals, but that the defendant would be liable under such conditions for such injury as you may find resulted to the plaintiff from the failure or neglect of the defendant to give such signal."

The trial court also refused to instruct the jury, as requested by counsel for appellant, that respondent and the motorman were fellow servants. In other words, the trial court refused to so decide as a matter of law. The principal argument of counsel for appellant touching the giving and refusing to give these respective instructions, and the whole of their argument directed against the court's refusal to take the case from the jury, have to do, in their last analysis, only with questions of fact; as to which, in the light of the evidence, we think reasonable minds might reach different conclusions. It is true, as pointed out by counsel for appellant, that the custom of giving sound signals to employees of the starting of the train was testified to by respondent and his witness from their experience as employees that day only. But whether or not the custom, and respondent's knowledge thereof, were sufficiently proven to warrant him in relying thereon, instead of being constantly on guard against the sudden movement of the train, we think was, under all the circumstances shown, a question for the jury to decide. The jury might well have believed that, during the several hours' work preceding respondent's injury, the signals were given with such frequency just before the moving of the train each time, as to induce him to believe that he could safely rely thereon; and that the conditions of the

work were such that signals of that nature to the workmen, warning them of the starting of the train, were likely to be required by appellant. We think it cannot be decided as a matter of law, in view of all the surrounding circumstances, that the duty of giving the signals was a mere detail of the work performable by the motorman as respondent's fellow servant. *Comrade v. Atlas Lumber & Shingle Co.*, 44 Wash. 470, 87 Pac. 517; *Anderson v. Globe Nav. Co.*, 57 Wash. 502, 107 Pac. 376; *Norman v. Shipowners Stevedore Co.*, 59 Wash. 244, 109 Pac. 1012; *Jacobsen v. Rothschild*, 62 Wash. 127, 113 Pac. 261; *Grosgean v. Denny-Renton Clay & Coal Co.*, 62 Wash. 196, 113 Pac. 570; *Cole v. Gerrick*, 62 Wash. 226, 113 Pac. 565.

The evidence may not show, as argued by counsel for appellant, a condition which required appellant to have a system of signals prior to the starting of the train each time it was moved from pile to pile of timbers, so the workmen would be warned of such starting. But that was not the theory of counsel for respondent, their theory being that there was in fact a system of signals used by appellant upon which respondent had a right to rely.

The contention that respondent was guilty of contributory negligence as a matter of law; and other minor contentions made in appellant's behalf, we think are without merit, and that the case does not call for further discussion.

The judgment is affirmed.

CHADWICK, C. J., FULLERTON, MOUNT, and HOLCOMB, JJ., concur.

[No. 14832. Department Two. May 15, 1919.]

FRED KIENBAUM *et al.*, *Appellants*, v. RATHFON REDUCTION WORKS *et al.*, *Respondents*.[1]

MINES AND MINERALS (16-21) — CONVEYANCES AND CONTRACTS — AGREEMENT TO SECURE ADVANCES—CONSTRUCTION. An agreement by parties making advances to complete the purchase of mining property, by which they promise to pay, on or before a certain date, a certain obligation of the company upon the following terms and conditions, viz: by paying a *pro rata* share of royalties received by them in the operation of the mine, up to the date mentioned, and if it is not then paid, the remainder to be assumed by the mining company, is not a binding contract to pay the account in full, but only to pay the *pro rata* share of the royalties received.

SAME (16-21). Where a deed to mining property was given to secure advances made by plaintiffs, who promised to pay a *pro rata* share of royalties received by them in the operation of the mine to be applied on a certain trustee account (one of the obligations of the company), the promise to pay the royalties is not satisfied by crediting the amount on the obligations of the company to the plaintiffs; but payment of the same for the benefit of the parties holding the trust account is a condition precedent to plaintiff's action to foreclose the deed as a mortgage securing the advances.

MORTGAGES (243) — FORECLOSURE — ATTORNEY'S FEES—REASONABLE AMOUNT. In a suit for the foreclosure of a deed to secure advances which did not provide for attorney's fees for its foreclosure, only the statutory costs as attorney's fees can be allowed.

BILLS AND NOTES (144)—ACTIONS—ATTORNEY'S FEES. In an action on a promissory note for $8,572 and a reasonable attorney's fee, in which the court found a balance due of $587, the sum of $300 is a sufficient allowance for attorney's fees.

Appeal from a judgment of the superior court for Ferry county, Neal, J., entered October 29, 1917, upon findings in favor of the defendants, in an action to foreclose a deed as a mortgage, tried to the court. Reversed.

A. H. Kenyon, for appellants.

Geo. V. Alexander, for respondents.

[1]Reported in 181 Pac. 10.

FULLERTON, J.—Some time prior to March 10, 1908, the county of Ferry became the owner, through tax foreclosure proceedings, of two certain mining claims, situated within its boundaries. On the day named, it leased the property to one Richard Mulroy for a term of two years, the lease providing that Mulroy should mine the property, ship and smelt the ores so mined, and turn over to the county a certain percentage of the smelter returns. The lease also granted Mulroy an option to purchase the property for a stated consideration, agreeing that the sums received as royalties should be credited on the purchase price if the option was exercised. Mulroy assigned his interests in the lease to one J. L. Harper, and Harper in turn assigned to a corporation known as the New Republic Company.

The option to purchase was not exercised by the lessee or his assigns, and on March 3, 1910, the county entered into an agreement with the New Republic Company for a sale of the property. In this agreement, the purchaser agreed to pay for the property the sum of $29,075.83, in the manner following: It agreed to enter into and hold possession of the property; operate the same; ship and smelt the ores taken from the mine; pay to the county a certain percentage of the net smelter returns for the first year, an increased percentage of such returns, for the first half of the second year, a further increased percentage, for the second half of the second year; and at the end of the second year, to pay to the county such balance of the purchase price as remained, after crediting thereon the sums received from the smelter returns; the county agreeing to deed the property to the purchaser or its assigns on the payment of the purchase price.

On September 23, 1910, the New Republic Company assigned its contract of purchase to D. W. Rathfon, A. L. Bradley and F. W. Bewley. As a consideration for the assignment, the assignees assumed the obligations of the assignor to the county of Ferry, and in addition to the royalties payable to the county by the terms of that contract, agreed to pay into the treasury of the New Republic Company a royalty of five per cent on the values of the smelted ores, until the expiration of the contract with the county, and if they then purchased the property, would pay to the New Republic Company the sum of $100,000. They further agreed to organize a holding company and assign to such company the contract of purchase. Pursuant to this agreement, the assignees organized a corporation under the name of Rathfon Reduction Works, and made the assignment as agreed; the corporation, as part of the consideration for the assignment, assuming the obligations of the assignors with the New Republic Company. The Rathfon Reduction Works entered into possession of and operated the property. It did not, however, meet the final payment due the county at the time it matured, and extensions of time were granted it by the county. The Rathfon Reduction Works seems not to have been at all times able to meet its current expenses, and Rathfon, Bradley and Bewley advanced moneys to its use. These sums were carried on the books of the corporation as the "Rathfon Trustee Account," and were the acknowledged obligations of the company, which it had agreed to repay with interest. At the time of the transfer by the New Republic Company to Rathfon, Bradley, and Bewley, the company owed certain obligations, the principal one of which was a note to John Hollis for the sum of $7,500. This note was expected to be liqui-

dated from the royalties agreed to be paid to the company in the agreement of transfer.

On January 7, 1914, the note and account mentioned were unpaid. The Rathfon Reduction Works seemed, also, to be unable to satisfy the county that the obligation remaining due to it on the purchase price of the property would ultimately be paid. This condition led to the following agreement between the appellants in the present action, who were then stockholders in the Rathfon Reduction Works, and that corporation, namely:

"AGREEMENT for which, for valuable consideration, the receipt whereof is hereby acknowledged, Fred Kienbaum, John Hollis and F. B. Babcock, parties of the first part and the Rathfon Reduction Works, a corporation, party of the second part, agrees each for himself, his heirs or assigns, to be firmly bound by these presents as follows, to wit:

"The parties of the first part undertake and agree that, on or before March 1st, A. D. 1916, they will pay or cause to be paid to the treasurer of Ferry county, all of the amount due and necessary to fully satisfy the requirements of the present lease and bond, thereby completing title and transfer by deed, in fee simple to the Rathfon Reduction Works all of the mining property named in said lease and bond, more particularly described as the Republic and Cecelia lode mining claims and mining claims and to pay the amount of one certain note for $7,500, given to John Hollis, trustee by the New Republic Co., and the amount of indebtedness represented in legal account credited to D. W. Rathfon trustee on the books of the Rathfon Reduction Works or the sum total of all money advanced by D. W. Rathfon, A. L. Bradley and F. W. Bewley due and not paid on or before March 1st, 1914, and all of which payments shall be made upon the following terms and conditions.

"Thirty per cent of all net smelter or bullion returns mined and milled from the above mentioned mining property shall be immediately paid to the Waverly

Exchange Bank for the benefit of the said parties of the first part under the terms of this agreement, on all ore shipped or milled after March 1st, 1914. Net smelter returns shall mean the amount received after freight and treatment charges have been deducted and net bullion returns shall mean the amount received after deducting reasonable milling charges.

"A correct account of all amounts and interest accruing on said John Hollis trustee note, D. W. Rathfon trustee account and the amount due and payable to Ferry county, on lease and bond shall be kept and payments made, set aside or credited as follows: Considering at date of each payment the amount due and not yet paid by the company to or for Ferry county John Hollis trustee note and D. W. Rathfon trustee account as each a separate unit; then pay to each party or fund its respective *pro rata* share as represented in the aggregate of all the amounts; excepting always that 5% of such net smelter or bullion returns which are presumably paid to the New Republic Co., shall first be deducted from any payment on the John Hollis note and the balance of note pro rated.

"If any time it shall be necessary for the parties of the first part to advance money to complete payment on lease and bond, then the said party of the second part shall cause to be executed a note and first mortgage on the above mentioned property covered by lease and bond in favor of the said parties of the first part for the whole amount due them; note and mortgage due and payable on or before March 1st, A. D. 1916, and to bear interest at the rate of 10% per annum.

"On March 1st, A. D. 1916, the party of the second part shall assume and pay any remaining balance on said John Hollis trustee note and D. W. Rathfon trustee account, thereby relieving the said party of the first part from any further responsibility in the matter.

"The said party of the second part shall continue to operate and carry on the business of mining the property during the life of this agreement, under the

same restrictions, conditions and method of mining as required by the present lease and bond.

"The party of the first part shall at all times protect the party of the second part in legal possession of the said mining property, and if any payments are due or necessary to be made to Ferry county to fully protect the company's interests, then any such amount of payment may be made directly to said Ferry county and the remainder paid to the Waverly Exchange Bank as above mentioned.

"For and in consideration of the above mentioned guarantee, possible payments and services, the said Rathfon Reduction Works, party of the second part, will properly issue to the Waverly Exchange Bank 82,124 shares of the capital stock of said company and deliver same to said bank under proper escrow agreement to hold such stock until all of the above mentioned indebtedness shall be paid; and then deliver to the order of the above mentioned parties of the first part.

"Signed and executed at Republic, Wash., this 6th day of January, A. D. 1914."

Pursuant to the agreement, the appellants, on March 3, 1914, paid to Ferry county, on the purchase price of the property, the sum of $5,000, and on July 22, 1914, paid the further sum of $16,950, the balance due thereon, taking a deed from the county directly to themselves. The Rathfon Reduction Works continued to operate the property for some time longer, paying in royalties to the Waverly Exchange Bank under the provisions of the agreement set forth the sum of $10,300. Out of this sum, the appellants paid a portion of the Hollis note and certain other obligations, but paid no part thereof on the Rathfon trustee account. On this account there was due on January 6, 1914, the sum of $9,060.23.

The appellants treated the deed from Ferry county to them as security for the sums advanced by them

for the use of the Rathfon Reduction Works, and on November 22, 1916, began the present action to foreclose it as a mortgage. In their complaint, the appellants set forth the several agreements hereinbefore mentioned, including the agreement between themselves and the Rathfon Reduction Works; set forth their advancements to the county of Ferry, made in pursuance of the agreement; alleged ownership of the Hollis note, and that there remained due and unpaid thereon the sum of $8,572.76, and that the sum of $1,500 is a reasonable sum to be allowed as attorney's fees for bringing suit thereon. While they alleged generally a full performance of the terms of the agreement, no mention was made of the Rathfon trustee account, nor was mention made of the $10,300 paid to the Waverly Exchange Bank for their use. The prayer was for the recovery of $35,801.88; for an attorney's fee of $1,500, and a foreclosure of the lien and a sale of the property thereunder in the usual manner. The answer put in issue certain of the allegations of the complaint, set up the several agreements hereinbefore outlined, and pleaded a breach on the part of the appellants of the agreement entered into between the parties hereto. It also set forth the payment of the royalties to the Waverly Exchange Bank pursuant to the last named agreement, that the appellants had failed to account for the same, and that it had not paid the Rathfon trustee account. The prayer was for relief appropriate to its allegations. A reply was filed putting in issue the affirmative allegations of the answer.

On the issues as framed, the cause was tried to the court. At the conclusion of the evidence, the court found the deed from Ferry county to the appellants to be a mortgage and security for the sums advanced

and agreed to be advanced by the appellants and that the appellants were entitled to a decree foreclosing it as a mortgage. Striking the account between the parties, the court further found that there remained due on the Hollis note, after applying the payments thereon applicable thereto, the sum of $587.14; that the sums paid to the county of Ferry with interest, amounted to the sum of $27,206.27; that the appellants had agreed to pay the Rathfon trustee account and had not paid the same, and that the amount due thereon with interest was $11,956.31; and that the appellants were entitled to an attorney's fee of $300. A decree was entered for the aggregate of these sums; the court decreeing, however, that no execution or order of sale should be entered on the decree until the appellants should pay to the respondents the amount of the Rathfon trustee account.

On this appeal, the appellants assign that the court erred, (1) in holding that they were obligated to pay the Rathfon trustee account; (2) in holding, if they are obligated to pay such account, that the sum due them was the amount found by the court, the amount being less than the sum actually due; and (3) in holding that the sum of $300 was a reasonable sum to be allowed as attorney's fees.

The appellants contend, in support of the first assignment of error, that the contract between the parties, by its express terms, does not obligate them to pay the Rathfon trustee account. This contract we have hereinbefore set out in full. Its perusal will show that it is somewhat inartificially drawn. In the first paragraph, after the introductory matter, it seems to be expressly provided that the appellants will pay the account on or before March 1, 1916. But this is followed by a statement that payments "shall be made

on the following terms and conditions," and this clause, by provisions for the operation of the mine by the respondents; for the payment to the Waverly Exchange Bank for the use of appellants of certain royalties, and for the prorating by the appellants of these royalties on this account with others named. Then follows an explicit provision that on "March 1st, A. D. 1916, the party of the second part Rathfon Reduction Works shall assume and pay any remaining balance on said . . . Rathfon trustee account, thereby relieving the said party of the first part [the appellants] from any further responsibility in the matter." This, it seems to us clear, is not an absolute agreement to pay the account. The appellants but promised to pay thereon a *pro rata* share of the royalties they should receive from the operation of the mine up to a certain date; and, if it was not then paid, the remainder was to be assumed by the respondents. As between these parties, therefore, there was no binding agreement to pay the account.

We are aware that the trial court rested its conclusion on the acts of the parties, construing those acts to be an interpretation of the contract in accordance with the respondents' contention. But we can find no justification in the evidence for this conclusion. The appellants' acts, it seems to us, indicate a repudiation of any obligation with respect to the account rather than an agreement to pay it.

This conclusion, however, does not mean that the appellants are to escape liability entirely with respect to the account. They did not pay thereon the *pro rata* share the account was entitled to receive of the royalties, and for this they are liable. Nor can it be satisfied by crediting the amount due on the obligation of the respondents to the appellants. In the execution of

the contract, the parties recognized the fact that the account was due to third persons who had advanced the money which it represented to the respondents, and recognized the fact that it was to be applied to their uses. Such sums as were received from the royalties, therefore, must be paid to the respondents for the benefit of the persons making the advancement as a condition precedent to a decree of foreclosure.

In arriving at the amount due, the court credited the entire amount received from the royalties to the Hollis note. Owing to the view the court took of the contract, this was a proper disposition of that fund. Since we hold that a part of this fund is payable to the trustee account, the credit on the Hollis note is too large by the amount rightly payable to the trustee account.

The attorney's fee allowed was sufficient. The deed, even as construed as a mortgage, did not carry with it an attorney's fee for its foreclosure other than the attorney's fee allowed as a part of the statutory costs. The only part of the obligation sued upon which provided for an attorney's fee in case of suit was the Hollis note, and for suit thereon the attorney's fee allowed was reasonable.

The decree entered is, therefore, reversed and the cause remanded with instructions to ascertain the amount due on the sums advanced by the appellants to Ferry county, with interest, ascertain the amount due on the Hollis note, and credit thereon the sums paid the Waverly Exchange Bank as royalties for the use of the appellants, less the *pro rata* share thereof payable to the Rathfon trustee account; require the appellants to pay into court, for the use of the beneficiaries of the trustee account, the last mentioned sum, and when it is so paid, enter a decree of fore-

closure in the usual form for the sums ascertained to be due.

PARKER, MOUNT, HOLCOMB, and MAIN, JJ., concur.

[No. 14971. Department Two. May 15, 1919.]

HENRY J. PIERCE, *Respondent*, v. VIOLETTA E. PIERCE, *Appellant*.[1]

STATUTES (86)—RETROACTIVE OPERATION—DIVORCE STATUTES. Laws 1917, p. 353, authorizing a divorce where the parties are estranged and have lived separate and apart for eight years or more, must be given a prospective operation, and does not apply to estrangements which existed prior to the passage of the act.

STATUTES (68)—LEGISLATIVE CONSTRUCTION—RETROACTIVE EFFECT. An intent to make retroactive a divorce statute (Laws 1917, p. 353) authorizing a divorce where the parties are estranged and have lived separate and apart for eight years or more, is not shown by the fact that the legislature rejected an amendment inserting "after the year 1917."

DIVORCE (50-1) — JUDGMENT — CONCLUSIVENESS. The denial of a divorce to a husband upon the ground that he was at fault and had caused the separation is conclusive and a bar to a second action by him upon the ground of estrangement and inability to live together.

DIVORCE (67)—SUIT MONEY—AMOUNT. The allowances for suit money being largely discretionary, an allowance of $2,000 for the defense of an action in which the traveling expenses of defendant and her witnesses was more than $800, will not be disturbed.

CHADWICK, C. J., dissents.

Appeal from a judgment of the superior court for King county, Frater, J., entered January 21, 1918, upon findings in favor of the plaintiff, in an action for divorce, tried to the court. Reversed.

Graves, Kizer & Graves, for appellant.

Kerr & McCord, for respondent, contended, *inter alia*, that the statute has a retrospective operation and

[1]Reported in 181 Pac. 24.

was intended to apply to estrangements that existed prior to its enactment. 36 Cyc. 1173, 1174; 2 Lewis Sutherland, Statutory Construction, § 674; *Cooke v. Cooke,* 164 N. C. 272, 80 S. E. 178; *Cole v. Cole,* 27 Wis. 531; *Van Hook v. Whitlock,* 2d Edw. Ch. (N. Y.) 304; *State v. Duff*, 80 Wis. 13, 49 N. W. 23; *Fitzpatrick v. Simonson Bros. Mfg. Co.,* 86 Minn. 140, 90 N. W. 378.

MOUNT, J.—This action was brought for divorce based upon subdivision 8, § 1, ch. 106, Laws of 1917, p. 353 (amending § 982, Rem. Code). The statute is as follows:

"Divorces may be granted by the superior court on application of the party injured, for the following causes: . . ."

Then, after enumerating seven subdivisions,

"(8) Where the parties are estranged and have lived separate and apart for eight years or more and the court shall be satisfied that the parties can no longer live together."

The complaint alleged, among other things:

"That long prior to the first day of January, 1909, the plaintiff and defendant became estranged, that unhappy differences arose between them and they realized that they could no longer live together as husband and wife, and that they have ever since continuously been and are now estranged. That on the first of January, 1909, the plaintiff and defendant, by reason of said estrangement and unhappy differences, mutually agreed to live separate and apart, each from the other, and entered into a written agreement of separation, bearing date January 1, 1909, which said agreement was acknowledged before a notary public by the said Henry J. Pierce on the 26th day of January, 1909, and by the said Violetta E. Pierce on the 17th day of April, 1909. That by the terms of said agreement the parties thereto not only agreed to live separate and apart, but the said plaintiff agreed that

he would not reside in the city of Buffalo, county of Erie, or within twenty-five miles of any boundary of said city, and the said defendant agreed that she would not reside in the city of New York, or within twenty-five miles of any boundary of said city.

"That said parties by said agreement stipulated that each should be released and discharged from the performance of all marital duties as fully and completely in all respects as if the parties had never intermarried.

"That said separation has been continuous and without interruption for a period of more than eight years prior to the date of the commencement of this action, and that said estrangement has existed for a period of more than eight years prior to the commencement of this action, and that the plaintiff and the defendant can no longer live together as husband and wife."

For answer, the defendant plead three separate defenses, to the effect that the separation was caused solely by the fault of the plaintiff; that the plaintiff, in January, 1908, commenced an action for divorce in the circuit court of the city of St. Louis, Missouri, in which he alleged that the defendant had abandoned him and had rendered to him such indignities as made his life intolerable; that the defendant appeared in that action and it was there determined that the plaintiff had abandoned the defendant, and the divorce was denied; that, subsequently, in the year 1909, the plaintiff brought an action in Spokane county, in this state, against the defendant, upon substantially the same grounds; that a finding was made in the case that the plaintiff had abandoned the defendant, and a divorce was denied; that, after the first action, hereinbefore named, was brought by the plaintiff, in Missouri, the defendant, being a resident of the state of New York, brought an action in that state to require the plaintiff to provide maintenance and support for herself and

their children; and that that action for support and maintenance was compromised by the plaintiff entering into an agreement to turn over to the defendant certain property and to pay her $300 per month for the support of herself and their children. The defendant, for further and separate answer, alleged, in substance, that since the year 1911 she had been willing to resume marital relations with the plaintiff and live with him as his wife wherever he might elect to make their home. The defendant prayed that the action be dismissed and that she should have an allowance for suit money and attorney's fees. On the trial of these issues, the court granted the plaintiff a divorce, but required him to pay to the defendant the sum of $400 per month for the support and maintenance of herself and their children, and $2,000 suit money and attorney's fees. The defendant has appealed from that judgment.

The first contention made by the appellant is that subdivision 8 of the divorce statute is not retroactive. This subdivision was an amendment to the original divorce statute. It was passed in 1917. The amendment is quoted above. It will be noticed from a reading of the statute that it does not appear upon its face to relate back beyond the date of its passage. It simply says that

"Divorces may be granted by the superior court on application of the party injured, for the following causes: . . .

"(8) Where the parties are estranged and have lived separate and apart for eight years or more and the court shall be satisfied that the parties can no longer live together."

No pretension is made in this case that the parties have become estranged and have lived separate and apart eight years since the passage of that amend-

ment. The sole contention is that the parties became estranged and have lived separate and apart for eight years, the greater portion of which time, necessarily, was prior to the enactment of this amendment. We are asked now to give this statute a retroactive effect so as to make it apply to estrangements which existed prior to the passage of the act. In *Graves v. Dunlap,* 87 Wash. 648, 152 Pac. 532, Ann. Cas. 1917B 944, L. R. A. 1916C 338, we said:

"It is a rule of construction that a statute will not be given a retroactive effect unless by its terms it is shown clearly that that was the legislative intent."

In 14 Cyc. 594, it is stated:

"A statute declaring the causes for which divorces may be granted is ordinarily to be given a prospective operation only and does not authorize a divorce for a specified cause which occurred before the statute was enacted."

In Nelson on Divorce and Separation, vol. 1, at § 12, it is stated:

"The obvious intent is that the law will apply to misconduct occurring after the passage of the act. Under some constitutions an act making prior misconduct a cause for divorce will be held void so far as retrospective. . . . Whether void or not, the courts generally decline to give such statutes a retrospective interpretation. The rule is that statutes are to be given a prospective operation only, unless the terms show clearly that a retrospective operation was intended. A divorce law will not be given a retrospective operation even though the terms might admit of it."

In *Jarvis v. Jarvis,* 3 Edwards Ch. (N. Y.) 462, where a new section had been added to the statute of New York providing for limited divorces, extending the right thereto to cases in which it had not theretofore existed, it was said:

"In order to give her the benefit of the remedy which the bill seeks, the revised statutes, as applicable to her case, must be construed to have a retrospective effect. It is a rule, however, never to apply a statute retrospectively by mere construction. If its terms are such as clearly to indicate that the legislature intended it should operate upon or apply to past transactions of a civil nature, then the courts may permit it so to apply, provided it takes away no previously vested rights, nor impairs the obligations of contracts within the meaning of the federal constitution. But, if a statute is silent in its terms or at all ambiguous in relation to its effect and application to past events, courts of justice are bound not to apply it to any other than to those which have arisen since the law took effect and are not at liberty to consider it other than as a prospective law operating prospectively upon the affairs and conduct of men."

To the same effect are *Barrington v. Barrington,* 76 South. (Ala.) 81; *Carson v. Carson,* 40 Miss. 349. This is a rule of almost universal application. An examination of the statute in relation to divorce does not disclose any intention on the part of the legislature that the act should have a retroactive effect. It must, therefore, be held not retroactive.

Counsel for the respondent cite the record of the legislature referring to the passage of the act, to the effect that an amendment was proposed thereto as follows: "That section 1, line 17, insert 'after the year 1917.'" This amendment was lost. The argument apparently is that, because this amendment was lost, it shows an intention on the part of the legislature that the act should take effect retroactively. If we may examine the legislative record in order to determine the legislative intent—a question we do not now decide—we are of the opinion that the result claimed does not follow. The reason the amendment was lost was plainly because the legislature concluded

that the amendment was not necessary, for the reason that the act would not take effect retroactively even if that amendment were not made. The mere fact that this amendment was lost, does not disclose that the legislature intended this amendment to the divorce law to be retroactive. The statute not being retroactive, it follows that respondent was not entitled to a divorce.

There is another equally good reason why the divorce should not have been granted. The statute provides that divorces may be granted by the superior court on the application of the party injured, for the causes therein named. It was conclusively shown upon the trial that the parties to this action, in two other cases—one in the state of Missouri and the other in this state—had litigated the question of fault for the separation, and that in each of those cases it was determined that the respondent was at fault and not the appellant. In the case which came to this court (*Pierce v. Pierce,* 68 Wash. 415, 123 Pac. 598), the principal facts relating to the history of the case and parties are set out. It is unnecessary to again set them out here. In that case, referring to the question of fault for the separation, we said:

"The record convinces us that appellant has deserted his wife and children without just cause. . . . There is no showing of conduct on respondent's part which we can accept as an excuse for appellant's abandonment of her and the children. . . . No sufficient showing has been made to justify us in awarding a decree in appellant's favor against the protest of the respondent who has done no wrong. In her pleadings and evidence, she has alleged and testified that she will again receive appellant in her home; that she will live with him as his wife; that she will do all she can to renew their former relations and make him a happy home, and that she will forgive and forget the past.

These offers, which she has repeatedly made and still makes, have been continuously and persistently rejected. The record is devoid of even a suggestion that he at any time has sought a reconciliation, or consented to live with his wife and family."

That case adjudicated the question and effectively determined who was at fault for the separation. This court has, upon different occasions, said, in substance, that a divorce will not be granted to a husband who is wholly at fault. *Johnsen v. Johnsen,* 78 Wash. 423, 139 Pac. 189, 1200; *Maloney v. Maloney,* 83 Wash. 656, 145 Pac. 631. It follows, for this reason, that the trial court should have denied a divorce to the respondent.

Appellant further contends that the allowance for costs and attorney's fees made by the lower court was entirely insufficient. The appellant testified that her expenses in coming to this state from Buffalo, New York, with her witnesses, were more than $800, and this did not include her living expenses while on the way and while here. The writer is satisfied that, under the circumstances of the case, the allowance made by the lower court should be doubled; but we are not in harmony upon this question, and since the matter is largely discretionary with the lower court, we decline for that reason to direct any further allowance.

For the reasons above given, that part of the judgment of the lower court granting a divorce is reversed.

Appellant will recover her costs.

PARKER and FULLERTON, JJ., concur.

HOLCOMB, J. (concurring)—I concur in the reasons expressed above and the reversal of the case, but am convinced appellant should be awarded double the allowance of suit money and attorney's fees.

CHADWICK, C. J. (dissenting)—The court holds that the act of 1917, Laws 1917, p. 353, § 1, subd. 8, amend-

ing § 982, Rem. Code, and adding thereto as a ground for divorce,

"Where the parties *are* estranged and *have* lived separate and apart for eight years or more and the court shall be satisfied that the parties can no longer live together,"

is not retroactive, and for that reason respondent cannot predicate an action upon an estrangement occurring before the passage of the act, albeit the parties have been estranged and have lived separate and apart for more than eight years prior to the beginning of the action.

That the amendment is not a bill of attainder or an *ex post facto* law, goes without saying. The power of the legislature to enact retroactive—or, more aptly to the case at bar—retrospective laws, provided they do not impair the obligation of existing contracts, is not denied; it is admitted by counsel, and may be passed without extended discussion.

The question is not, then, whether the legislature had power to pass the law, but whether the legislature intended that the remedy should operate as well upon preexisting, existing and future causes. It has been held in *Graves v. Dunlap,* 87 Wash. 648, 152 Pac. 532, Ann. Cas. 1917B 944, L. R. A. 1916C 338:

"It is a rule of construction that a law will not be given a retroactive effect unless by its terms it is shown clearly that that was the legislative intent;"

and so, in *Jarvis v. Jarvis, Barrington v. Barrington, Carson v. Carson, supra,* and the texts cited in the majority opinion.

The best statement of the rule I have found is in *Carson v. Carson,* 40 Miss. 349, where the court, finding itself drawn up to the snubbing post of the law, condemned the policy of passing retrospective laws,

but held that the court was not, "at liberty to hold an act of the legislature to be void merely because of its retrospective character, when no constitutional provision has been violated." The act in that case was held to be obnoxious, not because it was retrospective in the sense that it gave a remedy for preexisting causes, but because the act purported "to operate alone upon acts that have already passed, and has no prospective operation whatever."

In the *Carson* case we have the rule and its limitation, which is, the legislature having power, an act will not be rejected as retrospective unless it purports to operate "alone" upon past events.

After the very proper holding that a law will not be given retroactive effect unless by its terms it is clearly shown that that was the legislative intent, the writer of the opinion finds boldly that the rejection of an amendment seeking to fix the operation of the law to causes arising after 1917 indicates the legislative intent that the act should only operate in the future. He says further:

"The reason the amendment was lost was plainly because the legislature concluded that the amendment was not necessary, for the reason that the act would not take effect retroactively even if that amendment were not made."

This is no more than judicial dogmatism. It is unsound. It violates the natural inferences arising from the conduct of the legislature and convicts it of rejecting a declaration of record of its true intent and a deliberate purpose to encourage, if not to create, a doubt that arises in all cases where acts are remedial of concurrent and continuing wrongs or conditions.

As I read the record, a rejection of the amendment indicates a legislative intent to make the act appli-

cable to existing and continuing conditions. If we are to credit the legislature with sufficient technical learning to know that the amendment was not necessary because it knew the act was prospective only, is it not more natural to infer that, with such knowledge, it would have removed all questions and saved the issue now presented and which has arisen in hundreds, if not thousands, of like cases? The effect of the court's holding is that, whereas some member of the legislature said, "Let us agree that this act is prospective only," and the legislature by vote of its members rejected his proposal; therefore the act is not retrospective. The fact that the legislature, by its solemn and formal vote, said that the act should *not* be prospective only, is a legislative declaration that it intended that it should be retrospective. To meet the demands of this court, the legislature must hereafter treat every subject-matter by both an affirmative and a negative vote; must first vote that "it shall be," and then vote that "it shall not be."

Admitting then that retrospective laws are not favored by the courts, it does not follow that the act in question is either retrospective or retroactive in a legal sense. The character of an act is the most important guide in determining whether it is retrospective. Remedial statutes, although retrospective, are not regarded as obnoxious *per se*. The statute in question involves no vested rights; its purpose is to cure an evil offensive to society—that is, the living apart, under a tie of matrimony, of persons who are permanently estranged. The authorities sustain me in the assertion that a remedial statute is not retrospective or retroactive because a part of the requisites of its actions are drawn from a time antecedent to its passage, or as said by Lord Denman, in *R. v. St.*

Mary, 12 Q. B. 127: "Because a part of the requisites for its action is drawn from time antecedent to its passing." Endlich, Interpretation of Statutes, § 280.

The rule quoted by the majority is not the only rule of statutory construction; there are others, one of which is as well grounded as the one relied on and more consists with the duty of courts to declare and give effect to the legislative will; it is, where a statute is remedial, either of past or future events or conditions, every reason exists for a liberal interpretation.

It appearing to me that the intent of the legislature is made certain by reference to the terms and provisions of the act, *i. e.*, ". . . where the parties *are* estranged and *have* lived separate and apart &c," and such intent having been asserted by an affirmative act of the legislature, its attention being riveted upon the very point at issue, the amendment should be held to apply to a condition existing prior to and at the time the act was passed.

The other ground upon which the court rests its decision is that, although the act be upheld as applying to past events, a divorce can only be granted to *the injured party*, and it having been twice judicially determined that respondent had no ground for divorce, he is therefore not injured and may not recover.

Under the law as it was at the time the amendment was passed, divorces could be granted only (with one exception to be hereafter noted) where there had been a positive injury, a wrong visited by one spouse upon the other. But it is the duty of the courts to give effect to a statute, if it is possible to do so without violating settled rules; and the words "the party in-

jured" should either be rejected as inconsistent with the eighth subdivision of the act as amended, which is the part relied on by respondent, or we should say that, society in general having an interest in all matters of marriage and divorce, where the parties to a marriage are estranged and have lived separate and apart for eight years or more and the court shall be satisfied that the parties can no longer live together, either party may be in law the injured party and apply for a divorce. In other words, both parties are innocent and both parties are injured if the fact of estrangement be established, and either or both may apply for a divorce upon that ground. "Injured," "to be injured," "injured party," does not necessarily imply a physical or a moral wrong. It may mean any deliction, wrong, or condition that would bring a party asserting it within the bound of a statute which recognizes it as a cause of action. It is not a question of such injuries as might be involved in the adultery of one or the other of the spouses, abandonment, cruel treatment, drunkenness, etc.

"Statutes relating to divorce should receive a liberal and equitable construction. The legislative intent should be ascertained and carried out in a manner calculated to afford the intended remedy. Such statutes are not penal and should not be given a strict construction. They are to be construed with reference to the apparent policy of the legislature as gathered from the entire act. To execute this policy, the meaning of the statute may be contracted or expanded from the ordinary or literal meaning of the terms." Nelson, Divorce, § 12.

This must be so, if the amendment of 1917 is to be sustained at all; for, if a party may not be an injured party in the sense in which I have outlined, no divorce could ever be granted upon the ground of estrange-

ment continuing for any period of years, and the act of the legislature was abortive. For before a divorce could be granted upon the ground of estrangement, the complaining party would have to make a showing of injury; that is to say, make a showing of some of the causes set out in the other subdivisions of the act, and the divorce (if one were granted) would be because of these positive injuries and not because of the estrangement; in other words, the law will be exactly as it was before the amendment of 1917 was passed.

My thought may be further illustrated and, as I believe, may be sustained by a reference to subdivision 8 of the original act (section 9 of the act as amended). In 1886, the legislature amended the divorce statute so as to provide for a divorce, "In case of incurable chronic mania or dementia of either party, having existed for ten years or more, the court may, in its discretion, grant a divorce." The effect of the court's opinion is to write this subdivision out of the books; for how can it be said that any spouse may be "injured," in the sense relied upon by the majority, when the other spouse has become the involuntary victim of incurable chronic mania or dementia? Yet, in a broad legal sense, this may be so, for there may be, as I have undertaken to make plain, an injury in a sense other than a positive wrong.

I apprehend that all of the judges of this court who have sat as superior court judges have granted divorces under the eighth subdivision of the act—the ninth subdivision of the amendment—being the insanity clause, and felt that they were obeying the will of the legislature as it is to be gathered from the act, and that an injury, in the sense of positive wrong, was not essential to the granting of a decree.

That the parties in this case are estranged is certain. No one can read the record and come to any other conclusion than that the appellant is not sincere and is not truthful in asserting her desire for a reconciliation. The court below, after a careful trial, held:

"It is manifest to the court that the defendant is not sincere nor truthful in stating that she desires a reconcilation between the plaintiff and herself; and that the defendant is estranged from the plaintiff, and that the plaintiff is estranged from the defendant."

Appellant has no intention, and has had no intention, of resuming marital relations with respondent. She is standing upon technical right and insisting that a marriage that has long since ceased to be real shall remain as a burden to the parties and as an offense to society.

My conclusion would eliminate all questions of *res adjudicata,* for, if it is the law in cases of estrangement that either or both parties may be the party injured because of the continuation of an intolerable relation, it being established that the estrangement is permanent and that the parties will no longer live together, the present action rests in a new cause of action that was not in any way passed upon or determined by the court in the previous suits, and respondent should be given his remedy.

[No. 15051. Department One. May 15, 1919.]

M. D. COGSHALL, *Respondent*, v. E. C. JONES *et al.*, *Appellants*.[1]

REFORMATION OF INSTRUMENTS (4)—GROUNDS—MISTAKE. Where, in an exchange of properties, plaintiff's deed, by inadvertence and mistake, included property that did not belong to her, she is entitled to have the deed reformed.

PRINCIPAL AND AGENT (15, 17)—MUTUAL RIGHTS—PROFITS MADE BY AGENT—FRAUD—EVIDENCE—SUFFICIENCY. Where a trade of lands was made by a woman with one who had acted as her local rental agent, the agent having purchased a tract for $875 for the purpose of trading it to her at a valuation of $4,000, the agent is not liable to account to her for his profits on the ground that he had violated a confidence reposed in him, where it appears that each party was in business for profit, and the agent was not trusted, but the principal acted upon the advice of her own investigator and did not at the trial question the agent's valuation of the land she had received.

Cross-appeals from a judgment of the superior court for Skagit county, Brawley, J., entered April 8, 1918, upon findings in favor of the plaintiff, in an action for reformation and for an accounting, tried to the court. Affirmed on plaintiff's appeal; modified on defendants' appeal.

Coleman & Gable, for appellants.

Fred C. Campbell, for respondent.

MITCHELL, J.—The plaintiff, Mrs. M. D. Cogshall, exchanged real estate with defendant. Alleging that she included in her deed a greater quantity of land than was intended, that defendant made a profit of $3,125 by the deal, and that the relations existing between the parties was such as to make him liable to her for the profits, she brought this action for a reformation of her deed of conveyance and for an accounting and recovery of the profits. Upon the trial, the

[1]Reported in 180 Pac. 898.

court found that by mistake plaintiff's deed conveyed more property than was intended, and entered judgment accordingly, describing and decreeing to defendant that which was meant to be conveyed. The court also found that, subsequent to taking title, defendants had placed a mortgage upon the whole of the property conveyed, and gave plaintiff a lien upon defendants' portion to the extent necessary to protect the property restored to her from the lien of said mortgage; and provided, if plaintiff should be required to pay in order to free her property from the lien of such mortgage, she should be entitled to a judgment against defendants for such amount, with the right to foreclose the lien upon their portion. The court further found that the relations existing between plaintiff and defendant E. C. Jones consisted so largely of confidence reposed in him in making the trade that he was liable to her for profits he had made, which, after allowing him a real estate commission of five per cent, amounted to the sum of $1,345.83, in which amount a personal judgment was awarded her against E. C. Jones and his wife. Defendants have appealed from the judgment entered. On the other hand, plaintiff, feeling aggrieved at the alleged inadequacy of the personal judgment, has taken a cross-appeal, claiming she is entitled to judgment in the sum of $3,125.

As to the decree of reformation of the deed, we are satisfied it was warranted by the facts. In his lifetime, respondent's husband, S. M. Cogshall, was a creditor of the Cogshall-Metzger Mill Company, of which he was president. In payment of its debt, the mill company conveyed to him the property herein decreed to appellant. At the time of that conveyance, however, the property was subject to a mortgage, and to protect its grantee the mill company conveyed to

him other property (including that restored to respondent by the judgment herein), with the understanding that, upon payment of the mortgage by the mill company, S. M. Cogshall would reconvey all of such other property to the mill company. Later, and not a great while prior to his death, which occurred in 1912, S. M. Cogshall conveyed all the property here involved to his son, S. B. Cogshall, in trust for the benefit of respondent. The mill company paid off the mortgage, but by neglect or oversight never received the reconveyance it was entitled to. At the time of the exchange of the properties between respondent and appellant, she knew, and it is satisfactorily deducible from the proof that he knew, she was the beneficial owner of only that portion of the property now awarded to him and his wife; but in making the deeds from the son to respondent and thence to appellant, on account of unfamiliarity with the descriptions, they erroneously and unintentionally included property belonging to the mill company. It was clearly a mistake, and appellant at the trial testified, in effect, that he believed she made a mistake in including property that really belonged to the mill company.

For the purposes of the other contention in the case, as we view it, the facts are about as follows: The property now declared by the judgment to be the property of appellants and intended to be conveyed by respondent consists of certain lots and four small residences in Sedro Woolley. Appellant, for a number of years, has been engaged in the real estate business in Sedro Woolley, taking the listing, for sale or trade, of lot, acre, and farm properties in and around Sedro Woolley and throughout Skagit and other counties of the state. He acted as agent for S. M. Cogshall, and then for respondent after her husband's death, in rent-

ing, collecting rents, and having some of the repairs made on the property only after he was so directed by the owner. Appellant never had any other business relations with respondent except those and the trade in question. Some of the most important repairs on the houses were attended to by respondent's son independent of appellant.

Respondent was familiar with her property for several years prior to 1910, but lived in Tacoma and never met appellant until the summer of 1916, just before the trade. On December 4, 1912, the son of respondent wrote to appellant asking if he thought there was any chance to sell all or any part of respondent's property and the price it would bring. The letter seems not to have been answered. Later, the son told appellant his mother wanted to dispose of her property, that if she could not sell it she would consider a trade, and now thinks he said she wanted $4,000 in cash, or more if it was traded. The last statement as to value appellant denied. Appellant told him that very little real estate was changing hands and he doubted if he could sell it. There was nothing said about commission nor was the property listed for sale or trade. Shortly afterwards, appellant showed the son a piece of property which he offered to trade for a part of the property, but the offer was declined. On May 22, 1915, apparently in answer to an inquiry from respondent, appellant wrote: "It is very hard to sell town property now . . . However, if you care to trade it for good logged-off land I might get you a trade." On May 26, 1915, she replied: "What can you submit for a trade in logged-off land? I might consider something in that line." Upon receipt of the letter, he submitted to her two offers to trade. One piece of property belonged to a client whose name was

not disclosed, and the other belonged to himself. The son examined both pieces and was not pleased. About this time, the owner of the eighty acres, who lived in Idaho, gave appellant a written contract to sell it for $900, appellant to have all he could get over that amount, but was to furnish an abstract if one was required. On sending the contract, the owner stated the land cost him more, but that he could use money to advantage at that time. On June 7, 1916, appellant wrote to respondent, saying he had a piece of logged-off land for which her property could be traded, gave the location and description of it, and said: "I think this would be a very advantageous trade for you. I will be pleased to have you or your son come and look at it." Upon her request, he wrote on June 23, 1916, giving the legal description of the land proposed to be traded to her, valued it at $4,000, and said: "I will be pleased to show you or your representative this proposition at any time, and will do all I can to get you a good deal." The property referred to is the eighty acres she finally traded for, and it may at this time be noted that at the trial respondent's attorney stated to the court that no question whatever was raised as to the value of the property respondent got, as compared with that she exchanged, that she was simply demanding the profits made by appellant in the trade; and the trial proceeded accordingly.

On receiving his letter of June 23, 1916, she wrote her son in Sioux Falls, S. D., asking his advice. He answered that he knew nothing of the land offered and could not advise her other than to suggest that she get their friend, Mr. George Cotton of Tacoma, to look at the property and report thereon. She procured the services of Mr. Cotton, an old friend of the family and a real estate agent for thirty-six years, who at her

expense personally examined the land in July and made a report to her fully describing it and its surroundings. Mr. Cotton was advised of the proposed trade before going to Skagit county, and while there he also examined her property. Upon his return, he gave her a plain statement of all he found out about the two properties and told her when she made up her mind he would write to appellant for her and help her in any way he could. Appellant went to Tacoma and saw respondent for the first time. He then offered to trade her a residence in Seattle or a tract of logged-off land near Seabeck, Washington. By arrangement, he and Mr. Cotton went to see the Seabeck land and she examined the Seattle property. Upon their return to Tacoma, she had not decided which, if either, property she would trade for. She said she did not want to pay any commission, and was told by appellant that, if she traded she would not have to pay any, that his pay would come from the other party. Within a few days, July 15, 1916, she had Mr. Cotton write that she would trade for the eighty-acre tract. Appellant at once wrote to the owner in Idaho of the trade offered, but he promptly said he would not trade for Sedro Woolley property, that he wanted only to sell. Appellant bought the eighty-acre tract for $875, and furnished a $25 abstract to carry out the trade with respondent. After being advised she would make the trade, all correspondence and business thereafter was conducted by her through Mr. Cotton, who prepared the deed from the son to respondent and the one from her to appellant, looked after and passed upon the abstracts and transfer of insurance policies and transmitted the deeds to a bank at Sedro Woolley, which finally delivered them on October 4, 1916. Before the exchange of deeds, re-

spondent was advised that the deed she executed should run to him and that, through his deed, she would get title to the eighty acres. In further proof of the business caution she used in her dealings with him and her care in having a definite understanding, it is worthy of notice that, after she got the eighty acres, she wrote to him on October 27, 1916, as follows:

"In one of your letters regarding the land which I now own you spoke of the timber on it and that there was some show for a sale of the same. Could that deal still be considered? Of course I want to sell it, and think perhaps it ought to be looked after while other timber is moving there. Would you look after my interests in this matter, and if so on what terms?"

Counsel for respondent contends the case of *Ackerson v. Elliott*, 97 Wash. 31, 165 Pac. 899, "is clearly decisive of the case at bar." We do not think so. In that case, the agent looked after all of his principal's property, she being a nonresident of the state. While having no authority to sell, he did find purchasers to whom sales were made. "She came to *depend* upon him in some measure for information and advice concerning conditions in Seattle and vicinity affecting her property there not only as to its earnings, but as to the possibility of its sale." She took his advice as to the purchase of other property in Seattle. Many confidential business letters passed between them, in which, among other things, she told him: "I shall be glad to keep in communication with you and to be advised by you." "I depend upon *your* advice above all others." "I have such confidence in your judgment I would value your opinion if you would favor me with it as in the past." Out of business respect for her agent, she sent him the season's greetings at Christmas time. The agent was offered $10,000 for the land, and shortly thereafter he had a party go to

the local attorney of the owner and offer $7,500 for it. The lawyer communicated the offer to the agent and asked his advice. The agent told him the offer was a good one, that it was all the land was worth, and that he thought the owner should be advised to accept it. She was advised of this by her lawyer, through whom she delivered her deed running to the agent's friend that had made the offer, who had been supplied with the money by the agent, who in turn took a conveyance to himself. The agent was held liable to account. That was a case in which, by a course of dealings, the confidence of the principal had been won by and expressed to the agent who deliberately initiated a plan to deceive and defraud, and thereafter carried it out by expressing a false judgment intending and believing it would be effective. It was a case in which the owner never sought any other advice. Clearly that is a different case from this.

Respondent cites a number of cases from this and other courts in support of the rule stated in *Dutton v. Willner*, 52 N. Y. 312, quoted in *Neis v. Farquharson*, 9 Wash. 508, 37 Pac. 697, as follows:

"It is a well settled and salutary rule that 'a person who undertakes to act for another in any matter shall not, in the same matter, act for himself.' "

The rule is universal, but assumes the existence of a relation different from that shown to have existed between these parties. The facts in this case speak for themselves. They do no violence to the principles of technical morality recognized by courts of equity. Each party was engaged in business for profit. As between themselves, each represented himself. True, "if confidence is reposed, it must be faithfully acted upon, and preserved from any intermixture of imposition;" but here, even while acting for years as a

rental agent, appellant was not trusted by respondent to even have a roof repaired, a house painted, a room papered, or a sidewalk built, without specific directions from her; and she even sent her son to attend to a part of such matters. It is also true, "if influence is acquired, it must be kept free from taint of selfish interests;" but he never asked for nor received her property for sale during all the years she desired to sell; nor did he ever volunteer, nor was he requested by her, to value it; nor can it be said he improperly influenced her in his valuation of $4,000 put on the eighty acres, when in due course of business he at that time had it for sale for another, because of two reasons; first, he was offering to trade with her and her son had recognized the rule in such cases, for he testified that, in speaking of the desire of his mother to dispose of her property, he told appellant she wanted $4,000 cash, but *more if it was traded;* and, second, because, at the trial, she made no question but that the eighty acres was actually worth $4,000. And again, "if the means of personal control are given, they must be always restrained to purposes of good faith and personal good;" but he was given no personal control; we have seen she never placed her property with him for sale; she did not write she wanted him to trade her property for logged-off land, but "What can you *submit* for a trade in logged-off land?" Subsequent events proved she did not mean to give him any personal control; for, upon getting his offer, she immediately took it up, through her son and the old family friend, Mr. Cotton, who represented her in all things until the deal was closed. Manifestly, he did not attempt or expect any personal control, for it is significant that in each of the six propositions to trade made by him he requested her to have her representative examine the property; and

it is a fact that, in each and every case, before deciding, either her son or Mr. Cotton or herself did examine the property. Under the circumstances, we conclude the appellant was under no obligation to account for profits he may have made in the trade, and that the judgment against him in this respect was erroneous.

Incidentally, appellant complains of the cost bill finally allowed by the trial court. An examination satisfies us it was correctly settled.

Respondent's cross-appeal is hereby decided adversely.

The cause is remanded with directions to the trial court to modify the judgment in conformity with this opinion. Appellants will recover their costs of appeal.

CHADWICK, C. J., TOLMAN, MACKINTOSH, and MAIN, JJ., concur.

[Nos. 15161, 15162. Department Two. May 15, 1919.]

ANNA SALT, *Respondent*, v. AXEL ANDERSON, *Appellant*. EMMA WOMACH, *Respondent*, v. AXEL ANDERSON, *Appellant*.[1]

CANCELLATION OF INSTRUMENTS (26)—RELIEF—RECOVERY OF DAMAGES. In an action for the cancellation of a deed upon the ground of failure of consideration, in which the prayer was for general relief, a court of equity may substitute a money judgment.

SAME (23½)—EVIDENCE—WEIGHT AND SUFFICIENCY. In an action for the cancellation of a deed, given in consideration of an agreement to convey other land of the same value, findings for the plaintiff are sustained, where the evidence of the parties as to the agreement was flatly contradictory, but defendant could show no convincing reason for the deed and the circumstances did not indicate a gift.

Appeal from a judgment of the superior court for Lincoln county, Sessions, J., entered June 15, 1918,

[1]Reported in 180 Pac. 873.

upon findings in favor of the plaintiffs, in consolidated actions to cancel a deed, tried to the court. Affirmed.

Martin & Jesseph, for appellant.

G. E. Lovell, for respondents.

HOLCOMB, J.—This action is to cancel a deed for failure of consideration.

The issue arose out of the following facts: In 1910, Albert Anderson, a resident of Lincoln county, Washington, died, leaving as his sole heir his mother, Thilda Anderson, who became the administratrix of his estate. The estate consisted of various pieces of land in Lincoln county including, among others, the so-called "Busey Place," which is the subject-matter of the present action. Some months after Albert Anderson's death, his mother also died, intestate, and Amanda Sandygren, one of the parties to this action in the lower court, was appointed administratrix of her mother's estate. There were five heirs of Thilda Anderson, among them the respondents Anna Salt and Emma Womach, and their half-brother and sister, Amanda Sandygren and Axel Anderson, the defendant below.

The complaint alleged that, during the probate of Thilda Anderson's estate, the administratrix, Amanda Sandygren, and the defendant below, Axel Anderson, persuaded Anna Salt and Emma Womach that, if they would execute a quitclaim deed in favor of Axel Anderson to the so-called "Busey Place," he, Anderson, would deed back to Anna Salt and Emma Womach other land of the same value, when the estate should be finally closed. Thereupon such quitclaim deed was executed by Anna Salt and Emma Womach to Axel Anderson, and, as the appellant further alleges, the estate was finally closed, but no return deed was ever

made to Salt and Womach by Anderson. Upon this statement of their cause, they prayed for the cancellation of the quitclaim deed aforementioned and for general relief. Anderson demurred to the complaint on a number of statutory grounds not material to this inquiry; and, upon being overruled, answered, substantially denying the allegations of the plaintiff's complaint, and affirmatively alleging that Anderson occupied by adverse possession; that the property was acquired by him through a transaction between himself and his deceased brother, Albert, as a partnership, and finally that the quitclaim deed was voluntarily executed by his half-sisters. The pleadings are of two separate actions, but for the purposes of trial the causes were consolidated and may properly be so regarded in their disposition here. The trial court found the facts to sustain the plaintiffs below, but substituted a money judgment, prorated to each, for their prayer for the cancellation of the deed.

The appeal presents two principal questions for our determination; first, whether the money recovery rendered by the lower court could properly be substituted for judgment of cancellation; and, second, whether the facts, as reported, support the finding of the lower court.

Briefly, appellant's theory, deduced from his argument, is that there is no equity in the bill and that this is a case where the court would have to find that it could not administer equitable relief. In support of this position appellant cites *Robinson v. Brooks,* 31 Wash. 60, 71 Pac. 721; *Knibbs v. Mortensen,* 89 Wash. 595, 154 Pac. 1109; *Gilbert Hunt Co. v. Parry,* 59 Wash. 646, 110 Pac. 541, Ann. Cas. 1912B 225; *Wintermute v. Carner,* 8 Wash. 585, 36 Pac. 490; *Toplitz v. Bauer,* 26 App. Div. 125, 49 N. Y. Supp. 840; *Dakin*

v. Union Pac. R. Co., 5 Fed. 665; *Von Beck v. Rondout*, 15 Abb. Prac. 48; 41 N. Y. 619; *Kinsey v. Bennett*, 37 S. C. 319, 15 S. E. 965; *Johnson v. Swanke*, 128 Wis. 68, 107 N. W. 481, 5 L. R. A. (N. S.) 1048, 8 Ann. Cas. 546; *Murkowski v. Murkowski*, 61 Wash. 103, 112 Pac. 92; *Prignon v. Daussat*, 4 Wash. 199, 29 Pac. 1046, 31 Am. St. 914; *Decker v. Schulze*, 11 Wash. 47, 39 Pac. 261, 48 Am. St. 858, 27 L. R. A. 335; *Brisky v. Lamb-Davis Lumber Co.*, 98 Wash. 162, 167 Pac. 118; *Chicago, T. & M. C. R. Co. v. Titterington*, 84 Tex. 218, 19 S. W. 472, 31 Am. St. 39; *Hawes v. Dobbs* (Com. Pl.), 18 N. Y. Supp. 123; *Robertson v. McPherson*, 4 Ind. App. 595, 31 N. E. 478; *Imperial Shale Brick Co. v. Jewett*, 169 N. Y. 143, 62 N. E. 167; *Denny v. McCown*, 34 Ore. 47, 54 Pac. 952; *Dodd v. Home Mut. Ins. Co.*, 22 Ore. 3, 28 Pac. 881, 29 Pac. 3; *Collier v. Collier* (N. J.), 33 Atl. 193. A digest of the citations from each is as follows: Where the equitable jurisdiction of the court has failed; where excessive items are claimed; where a lien failed; where a request for a jury to assess damages was denied; where the entire ground for equitable relief fails; where a purely equitable action was sought to be retained solely to give damages not demanded by plaintiff; where an agreement was within the statute of frauds; where a deed was made in consideration of a contract not an integral part of the deed; where there was partial failure of title sought to be conveyed; where no mistake, fraud or undue influence was shown in the making of an agreement; where the obligations of a deed were in the nature of covenants; where there is utter variance between a complaint in equity and the proof; where a money recovery was sought on a void trust deed; where the complaint alleges partly legal and partly equitable matters and fails in the equitable matters; in all such cases wherein the court cannot admin-

ister equitable relief, the action must be dismissed and the parties left to their remedy at law.

Against this, the respondents marshal the following cases: *New York Ice Co. v. Northwestern Ins. Co.*, 23 N. Y. 457; *Yarwood v. Johnson*, 29 Wash. 643, 70 Pac. 123; *Dormitzer v. German Sav. & Loan Soc.*, 23 Wash. 132, 62 Pac. 862; *Watson v. Glover*, 21 Wash. 677, 59 Pac. 516; *Murkowski v. Murkowski*, 61 Wash. 103, 112 Pac. 92; *MacKay v. Smith*, 27 Wash. 442, 67 Pac. 982; and *Hewett v. Dole*, 69 Wash. 163, 124 Pac. 374; 31 Cyc. 111. A digest of the argument which these cases support is: That equity will give relief upon the facts and not the prayer; where both legal and equitable relief are prayed for but the complainant fails on one side, relief may be awarded on the side established; that a prayer for general relief entitled complainant to any relief supported by the allegations of the complaint and the proofs introduced; that, where a complaint sounds in both equity and law, the plaintiff is not restricted to the relief asked for specially; where the prayer for special relief is defective, relief will be granted under the general prayer, consistent with the equities of the case.

We regard respondents' authorities as being consonant with the letter and spirit of the law as it applies in the instant case; indeed, in the face of the decision in the case of *Hewett v. Dole, supra*, we could not well do otherwise. *Hewett v. Dole* was a case in which the law was most comprehensively searched, analyzed and stated by Judge Ellis. The facts were more complex than in the instant case, but the general foundations are the same. The action was brought for the cancellation of an instrument upon the grounds that there was a failure of consideration. The court held that the deed could not be cancelled,

but a judgment would be given for money damages. Speaking for the court, Judge Ellis concluded his discussion with the following observations:

"We think the trial court correctly held that there was no such clear and convincing evidence of fraud as to warrant a rescission. The complaint, however, alleged, and the evidence established, facts sufficient to entitle the appellant to relief in damages, and the prayer was for general relief. The appellant is entitled to a judgment for the $1,000 cash payment."

In the instant case, the averment of fraud in the complaint was stricken upon motion of the respondents, but the prayer of the complaint was for general relief.

The second question presented is as to whether the facts justified any recovery at all. The testimony is flatly contradictory on each side; appellant asserts that nothing whatever was said about conveying to the grantors of the quitclaim deed any substitute property; the respondents are equally emphatic that such an agreement was the motive and consideration of their quitclaiming. The appellant does not go beyond a negation, he does not show affirmatively a convincing reason for respondents' action as against the position established by them. He admits that it was the oral wish of his mother that her estate should be equally divided between the children, and we cannot presume that the grantors intended the quitclaim deed as a gift. It is also apparent from the record that Anna Salt and Emma Womach are not such experienced business women as to suggest that they were culpably careless in the transaction. In view of the record, as a whole, we cannot disturb the finding of the trial court. This conclusion must also apply to the question of the lower court's valuation of the premises, and the question of Axel Anderson's pre-

vious control of the property in connection with his deceased brother, Albert; in both these matters we regard the court's findings as conclusive after a careful consideration of the entire record.

The judgment in each cause will be affirmed.

MOUNT, FULLERTON, and PARKER, JJ., concur.

[No. 15376. Department One. May 24, 1919.]

ADOLPH BEHRENS, *Appellant*, v. COMMERCIAL WATERWAY DISTRICT No. 1, OF KING COUNTY, *Respondent*.[1]

EMINENT DOMAIN (48)—TAXATION—SPECIAL ASSESSMENTS. Since Const., art. 7, § 9, expressly limits the levy of special assessments for local improvements to property benefited, there can be no greater charge made than a sum equal to the benefits received; for otherwise there would be a taking of property without compensation in violation of art. 1, § 16 (Held obiter, on rehearing En Banc).

NAVIGABLE WATERS (2-1)—WATERWAY DISTRICTS—ASSESSMENTS—MAXIMUM BENEFITS—INTEREST—BONDS. Rem. Code, § 8192a, authorizing an assessment of land benefited for the entire cost of a commercial waterway, not exceeding the maximum amount of benefits to be received, the levy not to be over twenty-five per cent of the cost in any one year, does not authorize a levy to meet interest payments on bonds to be issued in addition to the maximum benefits found, in view of the fact that there is no provision for the payment of interest, and in view of Id., § 8199a, appropriating and pledging "payment" of the bonds out of the maximum benefits stated and declared (Held obiter, on rehearing En Banc).

STATUTES (35-1)—AMENDMENTS—TITLE—SUBJECT. The title to chapter 152, Laws of 1917, p. 616, relating to assessments and bonds of commercial waterway districts is sufficient, under Const., art. 2, § 37, providing that no act shall be amended by mere reference to its title and requiring the amendment to set forth the act amended at full length.

Appeal from a judgment of the superior court for King county, Hall, J., entered May 2, 1919, upon sustaining a demurrer to the complaint, dismissing an

[1]Reported in 181 Pac. 892; 185 Pac. 628.

action to enjoin the issuance of bonds for a waterway district. Reversed.

Donworth, Todd & Higgins, for appellant.
Shorett, McLaren & Shorett, for respondent.

CHADWICK, C. J.—The purpose of this proceeding is to test the validity of certain bonds which the respondent waterway district intends to issue.

The bonds are a general issue, to be used in part for the refunding of an outstanding issue of approximately $500,000 and to meet the future needs of the respondent as occasion may require. The total present bonded indebtedness of the district is $1,121,500.

The present plan is pursued in virtue of the authority vested in waterway districts, and if accomplished will result in the issue of bonds in such amount that the total principal of all bonds then to be outstanding, while less in total amount than the total amount of maximum benefits, will, if account be taken of the interest now accrued and to accrue on the outstanding bonds, greatly exceed the amount of total maximum benefits.

It is confessed that the property cannot be charged in a principal sum greater than the total amount of the maximum benefits, but it is contended that the interest accrued and to accrue, which is depended upon by the respondent to swell the total indebtedness to an amount in excess of the maximum benefits, is no part of the cost and expense of the improvement; that the collection of interest, while incidental to the financial plan of the district, is not a thing to be considered as an item to be balanced as cost or expense against the total of maximum benefits.

The question submitted by counsel requires a construction of Rem. Code, § 8192a.

Since the authority of respondent rests in the statute, and that alone, we are not called upon to go beyond it or search for authority to sustain general principles, except to say:

"It is the basic principle and the very life of the doctrine of special assessments that there can be no special assessment to pay for a thing which has conferred no special benefit upon the property assessed. To assess property for a thing which did not benefit it would be *pro tanto* the taking of private property for a public use without compensation, hence unconstitutional. Though the right to levy special assessments for local improvements is referable solely to the sovereign power of taxation, our state constitution, article 7, § 9, expressly limits its exercise to assessments of property benefited." *In re Shilshole Avenue,* 85 Wash. 522, 537, 148 Pac. 781.

And

"Where no authority is given by statute, interest on the assessment cannot be collected. The taxing power must be strictly exercised and the particular sum only assessed." Hamilton, Law of Special Assessments, § 721.

Under a like statute, the supreme court of New Jersey held:

"The commissioners are to determine what proportion of the costs and expenses of the improvement shall be paid by the county, and the statute directs that amount to be raised by taxation. In the exercise of the taxing power, the board of freeholders is limited, by the terms of the statute, to the imposition of the sum assessed. No authority is given to increase the burden by adding interest. The taxing power must be strictly exercised." *Paterson Avenue etc. Road Com'rs v. Board of Chosen Freeholders of Hudson,* 44 N. J. L. 570.

Keeping in mind, then, that the expense and cost of all public works may be charged to property benefited,

it is fundamental that no greater charge can be made than a sum equal to the benefits received; for if a charge be made over and above the benefit to the property, it is a taking of property without just compensation and violates art. 1, § 16 of the Bill of Rights.

One of the first considerations of a court, when called upon to construe a statute, is to gather the true intent and meaning of the legislative body, and the first resort in such cases is the context and subject-matter of the statute. Taking the act by its four corners, it, as all acts of the legislative body which assume to put an involuntary charge upon private property for the public good, should be treated as a covenant between the state and the property owner. With this view, we are convinced that the waterway commission has no power to make a charge for interest unless it be within the limit of maximum benefits.

Referring now to the original authority of the waterway commission and the constitutional right of the property owner, and which may be said to be emphasized in the act, it seems plain that it was not the intention of the legislature to charge the property benefited beyond the maximum benefits to be obtained.

It is provided that, after the entry of a judgment of the court fixing the amount of the benefits,

". . . all *the lands* included in the list of lands benefited by such improvement *shall stand charged with the entire cost and expense* of said improvement *and the other costs, expenses and charges provided for by this act, not exceeding* with respect to any lot or tract of land (so far as concerns the original cost) *the maximum amount stated or declared in such judgment to be the maximum amount of benefits* to be derived by such lot or tract of land or the owners thereof, *and all such lands shall thereafter be subject to the assessments to be levied* by the board of commissioners *for said purposes, which assessments shall be levied*

pro rata in proportion to the maximum amount of benefits as to each lot or tract of land as stated or declared in such judgment." Rem. Code, § 8192a.

We find no provision for the payment of interest. There is a charge put upon the property to the extent, and to the extent only, of the maximum benefits to pay the costs and expenses of construction. There is nothing to suggest that the legislature intended that the property of an individual owner might be subjected to a lien upon his property equal in amount to the maximum benefits and be thereafter called upon to pay anything in addition thereto, whether it be in the nature of an interest charge or otherwise. This conclusion is sustained, as we believe, by the further provisions of the section that:

"All assessments shall be levied from time to time by the board of commissioners by written notice to be addressed to and served on the county assessor of the county, . . ."

the act then providing for the collection of the assessment, and it is further provided:

"The amount of the assessment levied by the commissioners during any one year shall not exceed twenty-five per cent of the amount estimated by the board of commissioners to be necessary to pay the costs of the proceedings and the establishment of said district and waterway system, and the cost of construction of said work: . . ."

It will be observed that the commissioners are denied the power to levy an assessment for more than twenty-five per cent of the cost and expense of construction in any one year, although they are not required to levy such assessments, the legislature evidently having it in mind that, when work such as the act contemplates had been undertaken, it would extend over a period of time, and that a charge of twenty-five per cent of the amount of the benefits in any one year

until the whole sum was collected would provide ample funds for the prosecution of the work; or, to state our conclusion in a different way, it is apparent that the legislature fixed the extreme boundary of a charge upon property benefited as the maximum amount of benefits; that the charge, in the mind of the legislature, was the cost and expense of construction, and that the property owner should have four years to pay, or rather could not be compelled to discharge the entire lien in less than four years. If the amount of his benefits is, say $100, he could be assessed that sum or any sum within it, and one-fourth payment in each year for four years would entirely discharge the lien. If it were held otherwise, the lien might sustain a perpetual interest charge; the commissioners might levy an assessment from time to time for one-fourth of the amount of the lien and exhaust the entire sum in the payment of interest and charges, costs of maintenance and operation, and other charges incidental to the bonded debt of the district that were not within the mind of the legislature at the time the act was passed. For it must be regarded as true that the legislature was providing a plan for the construction of waterways, intending that a payment from time to time by the property owner would be sufficient to meet the cost of construction (there are other provisions providing for maintenance and operation), and that it did not have in mind primarily a scheme for the issuance of bonds for the profit of those who are engaged in buying and selling them.

For the purposes of this argument we must assume that the property said to be benefited is now charged with the full amount of the maximum benefits. Let us assume that the lien is $100 upon a given tract. It is the law that the property owner shall never be called

upon to pay any sum in excess of $100. The commissioners may levy an assessment from time to time, and let us assume that the assessment is $25; the property owner pays it, and at a certain time, which time may be determined in the judgment and discretion of the commissioners, another assessment is levied, and so on, until, say in ten years, four $25 assessments are paid, or that $7, being a sum equal to the interest on $100, is collected for fourteen years. The property owner has paid on account of the improvements the full amount of the benefits. He sells his property. The purchaser buys it in the belief that, $100 having been paid, it is free of all liens. It is then determined that the amount collected has gone to the payment of interest on outstanding bonds and that no part of the amount collected has been applied upon the lien. The lien is a perpetual lien. If an owner cannot discharge his property by the payment of a sum equal to the amount of the benefits, under whatever pretense it may be collected, he might be called upon to pay several times its value and still suffer the burden of the lien, for the commissioners are under no duty to retire his bonds. On the contrary, they have sought and obtained authority to refund outstanding indebtedness from time to time. Laws of 1917, ch. 152, p. 616.

Our conclusion is further strengthened by reference to § 8199a. It is there provided that bonds may be issued, and

"In case such bonds are issued *there is hereby appropriated* and pledged *for the payment thereof a sufficient amount of all the maximum benefits* stated or declared, or to be stated or declared, by the judgment of the court against all the lands benefited and to be benefited by the improvement within such district *and there is hereby appropriated* and pledged *for such payment a sufficient amount of all sums charged against*

such lands and the assessments therefor *as will be sufficient to pay all such bonds as the same* or any part thereof *become due; and while any such bonds shall be outstanding the board* of commissioners *shall at no time levy any assessments for any purpose, other than their payment, which shall* so far impair the fund to be realized from the collection of all the assessments as to *jeopardize the payment of such bonds or to reduce such fund below the point where there will be ample amounts still leviable to provide for the payment thereof.*"

There being no exception in the statute, the holding is compelled that an appropriation and pledge for the "payment" of the bonds out of the maximum benefits "stated or declared" can mean only that "payment" is the discharge of the principal and interest of the bond, and that, in the payment of principal and interest, the commissioners shall not impair the fund to be realized from the collection of assessments so as to jeopardize the payments of the bonds or reduce such fund below the point where there will be ample amounts "still leviable" to provide for the payment thereof. The legislature would not have used the words "to jeopardize the payment of such bonds," and provided that the fund should not be reduced below a point where ample funds would not be "still leviable" to provide for the payment thereof, if it had had in mind that the commissioners would have a right to collect interest over and above the amount of maximum benefits, otherwise it must have provided that a property owner would have a right to discharge the lien immediately and take a full acquittance of his debt.

If this be not the true meaning of the act, the words "amounts still leviable" have no meaning and no place in the law. "Still," in its present setting, means something remaining out of an entire thing.

"Amounts still leviable" means, and can only mean, the difference or amount after the levy of one or more assessments and the amount of the maximum benefits. For, if interest be a lien on the property, it must fall within the limit of the maximum benefits, for that, by the terms of the law, is the limit of the lien. If the position of respondent be sustained and interest can be charged over and above the amount of maximum benefits, the charge cannot by any possibility be a lien, and would not, therefore, be collectible. It is not contended that the property owner is under any personal obligation to pay either the principal or interest.

The case of *Mall v. City of Portland,* 35 Ore. 89, 56 Pac. 654, is somewhat analogous. There the law provided that, as soon as a lien docket had been made up, it was the duty of the city to issue and sell, on the best terms available, its ten-year six per cent bonds, in all equal to the amount of assessments against the property affected by the improvement. The property owner had, under the terms of the law, an option to pay the assessment at the time it was made. The city thereafter levied a special tax equal to ten per cent of the amount docketed against the property charged, which, with the accrued interest at the rate of six per cent as provided in the statute, the owner tendered and demanded a receipt in full. The city refused the tender, claiming that the property owner and his property were liable for six per cent interest on the entire assessment from the time it was docketed, in addition to the special tax or tax for partial payment and interest thereon. The court held that the docketing of the assessment against the property in the lien docket did not render it due and payable; and to the contention that the provision requiring a special tax to be equal to ten per cent of the amount of bonds issued for the improvement necessarily implies that it would

be such per cent of the bonds and accrued interest on the whole assessment, the court said:

"The amount docketed as a lien against the property is necessarily the amount of the assessment, and a special tax of ten per cent thereof would clearly not include any interest thereon."

The court went so far as to hold that, although there was a privilege of discharging the whole amount of the lien, the terms of the act providing for an assessment equal to ten per cent of the indebtedness in each year did not imply that interest upon the whole assessment should be charged upon property of an owner who had not availed himself of the privilege of payment, saying:

"This language is, in terms, confined to the payment of the assessment and accrued interest thereon, and, as we have already seen, there can be no interest on an assessment of this character until it becomes due and payable."

Under the terms of our waterway act, the amount of an assessment is not due and payable at the time the decree of the court is entered, nor is there any privilege of payment, the law being that the property shall be subject to assessments to be levied by the board of commissioners and that all assessments shall be levied "from time to time," and that such assessments

"shall be levied against and apportioned to the lands in such district benefited by said improvement in proportion to the maximum benefits originally determined by the judgment of the court and such assessments *shall fall due during the then ensuing calendar year at the time of the falling due of general taxes.*" Rem. Code, § 8192a.

It would seem to require no argument to sustain our view that, if the charge is not due, interest can-

not be added to the amount of the lien until it is due and may be discharged.

A suggestion is made that an indefinite extension of the time of payment is a favor to the property owner. We are not holding that the act may not have provided for the payment of interest, but wherever an interest charge on special assessments has been sustained, the statute has given the property owner an opportunity to discharge his debt. The property owner has no such privilege in this case.

Interest is not allowed on assessments as for the use of money under a contract for its use, but as an involuntary charge to be collected as a penalty if the assessment is not paid at a time to be fixed when the property owner can pay his assessment and discharge the lien.

The legislature would have no constitutional right to put a charge of $100, or any other sum, upon the property of the citizen and say to him, "This is a charge equal to the maximum benefits to be derived from your property, but you cannot pay it unless you pay that sum and interest to accumulate for four years, or for forty years, thereafter," for this would contrive a scheme, not for the benefit of the property owner, but for the benefit of strangers to the enterprise, and for no consideration; for it cannot be held to be a good or valid consideration to extend the time of payment of a debt, either public or private, to a man who does not desire to postpone it or has no need of it.

We hold, therefore, that it is the meaning of the act that the waterway commission may function within the limit of its powers; that it may collect assessments to the extent of the maximum benefits; that it may issue bonds and refund an outstanding issue, but that it may not charge the property beyond the amount of maxi-

mum benefits, whether it be under the pretext of collecting interest or for any other charge, except as provided in the act. It is the duty of the respondent to see that the primary fund, which theoretically is the amount of maximum benefits, shall not be jeopardized or be allowed to go below a point, by overissue or otherwise, where there will not be amounts "still leviable" within the limit of maximum benefits to provide for the payment thereof.

MITCHELL, TOLMAN, and MACKINTOSH, JJ., concur.

ON REHEARING.

[*En Banc.* November 28, 1919.]

PER CURIAM.—On rehearing *En Banc,* the result reached by the Department is adhered to by the majority of the court; the majority considering that the title of the act is sufficient under § 37 of article II of our state constitution, and declining to pass upon any other state or Federal constitutional question raised by appellant because not necessary to a determination of the case. The result reached by the Department is sustained.

[No. 15313. *En Banc.* May 24, 1919.]

THE STATE OF WASHINGTON, *on the Relation of Frank P. Mullen, Plaintiff*, v. I. M. HOWELL, *Secretary of State, Respondent.*[1]

STATUTES (74)—CONSTRUCTION—EXCEPTIONS. The seventh amendment, art. 2, § 1, of the constitution, which reserves to the people a right to a referendum of all laws except such as are necessary for the immediate preservation of the public peace, health, or safety or support of public institutions, is an expression of a reservation to pass upon all things not specified in the exception.

CONSTITUTIONAL LAW (24) — STATUTES (54) — CONSTRUCTION. A law will not be held unconstitutional unless such holding is compelled.

CONSTITUTIONAL LAW (3) — CONSTRUCTION. Constitutional provisions must be interpreted with reference to the times and circumstances under which the constitution was framed.

STATUTES (2-3)—INITIATIVE AND REFERENDUM—WHAT LAWS SUBJECT TO—"ACT, BILL OR LAW"—APPROVING AMENDMENT TO FEDERAL CONSTITUTION. The joint resolution of the legislature ratifying the prohibition amendment to the Federal constitution is subject to referendum, being an "act, bill or law" within the meaning of the seventh amendment of the constitution, art. 2, § 1, adopting the referendum form of government.

SAME (2-3). The authority for state action on a proposed amendment to the Federal constitution is found in the Federal and not the state constitution, and the power to question it being in Congress and not in the courts, the contention that the legislature had no power to act by resolution is nonjusticiable.

SAME (2-3). Article 5 of the Federal constitution, providing that a proposed amendment shall be valid when ratified by the legislatures of three-fourths of the states, means that the ratification shall be by the legislative power of the state, which, under the reserved power of referendum, includes the whole people as part of the law making power, and renders legislative action on a proposed amendment subject to a referendum.

SAME (2-3). The adoption of the referendum form of government does not violate the Federal constitution, art. 4, § 4, guaranteeing to every state a republican form of government.

PARKER, MITCHELL, TOLMAN, and FULLERTON, JJ., dissent.

[1]Reported in 181 Pac. 920.

Application filed in the supreme court April 9, 1919, for a writ of mandamus to compel the secretary of state to accept and file a petition for a referendum. Granted.

Theodore A. Bell, John F. Murphy, Turner, Nuzum & Nuzum, and *P. C. Sullivan,* for relator.

L. L. Thompson, Attorney General, and *Glenn J. Fairbrook, Assistant,* for respondent.

CHADWICK, C. J.—At the general election held in 1912, the people of the state of Washington adopted as a principle of government the power to initiate laws and to review at the bar of popular opinion all acts, bills, or laws passed by the legislature of the state of Washington.

The right so to do is emphasized as a power reserved, and the terms of the amendment imply in the strongest possible way that the intention of the people was to reserve a right to review every act of the legislature which might affect the people in their civil rights or limit or extend their political liberties; for they wrote an exception, saying that a referendum may be ordered in all cases, "except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions." (Amendment 7, art. II, § 1.) The writing of an exception specifying the things not reserved is an expression, within sound rules of construction, of a reservation to pass upon all things not so specified.

The court, in passing directly upon the amendment, and in other cases arising under city charters, has held firm to the principle of the referendum and has consistently refused to limit it by construction.

In December, 1917, Congress proposed an amendment (Stats. of U. S., Sixty-Fifth Congress, 1918, Sess. II, Ch. 212, p. 1050) to the Federal constitution, providing that:

"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Sec. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

"Sec. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."

It will be noted that the amendment does not pertain to matters within the original concept of the constitution, to the definition or distribution of powers of public officers, but by its terms assumes to cover matters that are purely legislative and which have hitherto been a subject of legislation by the several states under the police power. We understand that the Federal government has no power to control the police power of the states except as such power may have been expressly granted, or as it may be necessary to maintain the acknowledged powers of the Federal government.

This amendment was submitted to, and ratified by, the legislature of the state of Washington by joint resolution passed January 13, 1919. On March 20, 1919, relator tendered a petition for a referendum to the respondent secretary of state; he asked that it be filed and a ballot title be supplied. Respondent re-

fused to receive it upon the grounds, (a) that the amendment, having been adopted by a joint resolution and not by an act, bill or law, was not within the terms of the seventh amendment; and (b) that it was not a subject for referendum under article V of the constitution of the United States.

Addressing ourselves to the first contention of the respondent, Is the resolution an act, bill or law, within the meaning of those terms as employed in our constitution; whether the people intended an act, bill, or law to be statutes enacted by the legislature, or whether they meant action by the legislature which affected them as law?

No cases have been cited, and we may confidently say that there are none holding to the rule of strict construction where the power of the whole people is in question. It is a rule, become axiomatic by long continued reiteration, that no court will hold a law to be unconstitutional unless such holding is compelled; that a law will not be held to be unconstitutional by construction; that is to say, the power of the legislative body, or the people if exercising that function, will not be abridged by the courts, or suffered to be abridged by others, if the thing sought to be done is within the spirit of the policy enunciated in the provision under consideration. To this end, the courts of the country have so addressed themselves that, without resort to the tedium of limitless authority, we may well adopt the language of Judge Cooley, who was an acknowledged master in the field of constitutional law; that constitutional provisions must be interpreted with reference to

"The times and circumstances under which the State Constitution was formed — the general spirit of the times and the prevailing sentiments among the people. Every constitution has a history of its own which is

likely to be more or less peculiar; and unless interpreted in the light of this history, is liable to be made to express purposes which were never within the minds of the people in agreeing to it." *People v. Harding,* 53 Mich. 481, 19 N. W. 155, 51 Am. Rep. 95.

"The safe way is to read its [the constitution's] language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then to construe it, if there be therein any doubtful expressions, in a way so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted." *Maxwell v. Dow,* 176 U. S. 581, 602.

"The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty—indeed, are under a solemn duty to look to the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority." *Mugler v. Kansas,* 123 U. S. 623, 661.

The people, too, have directly charged us with a duty to be mindful of their sovereign rights.

"A frequent recurrence to fundamental principles is essential to the security of individual rights, and the perpetuity of free government." Const., art. 1, § 32.

Wherefore, the purpose of the people in adopting the seventh amendment is a proper subject to be considered. Did they intend to grant any exceptions other than those enumerated in the seventh amendment? If this were an ordinary case of statutory construction, we have no doubt that we could all agree that we would look first to the old law, the mischief, and the remedy. It is more important in considering a question involving the first of all the sovereign rights of the citizen—the right to speak ultimately and finally in matters of political concern—that we should measure the power reserved by the former condition.

It is well known that the power of the referendum was asserted, not because the people had a willful or perverse desire to exercise the legislative function directly, but because they had become impressed with a profound conviction that the legislature had ceased to be responsive to the popular will. They endeavored to, and did—unless we attach ourselves to words and words alone, reject the idea upon which the referendum is founded, and blind ourselves to the great political movement that culminated in the seventh amendment—make reservation of the power to refer every act of the legislature with only certain enumerated exceptions.

Guided by these considerations, we are satisfied that the people used the words "act, bill or law" in no restricted sense, but in a sense commensurate with the political evil they sought to cure.

And why should not the amendment be a law within the meaning of the seventh amendment? No reason is assigned other than that "law" as there used is synonymous with "bill" or "act." We may well argue and be within sound rules that, if the people had so intended, they would not have used the word "law" at all, as was done in the state of Oregon. We can conceive of no more sweeping law than the proposed amendment. Certainly no amendment has ever been proposed that goes deeper into the vitals of the American idea of government. It surrenders *pro tanto* the sovereignty of the state, gives to the Federal government a right to enact laws and to enforce them through the Federal courts, and it will deny the citizen the protection of some of those guarantees that we have written out of the travail of time into our own Bill of Rights. Upon construction, we hold that the amendment to the constitution of the United States is a law

within the meaning of the seventh amendment, and is subject to referendum.

But it is contended that, whereas the legislature ratified the amendment by joint resolution instead of by act or bill as it might have done, the resolution being not *eo nomine* an act, bill or law, is not subject to a referendum. This argument defeats itself, for if we are to be literal and exact in terminology and so insistent upon "scholastic interpretation" as to admit this premise, we must hold that the legislature had no power to ratify the amendment except by act or bill, for we find no power granted in the constitution to that body to act in matters legislative other than by act or bill.

This reasoning would lead to two consequences, equally absurd: Either the amendment being ratified by resolution, the act of ratification is void as a thing done in a manner not provided; or, if sustained, would permit the legislature to defeat the power of referendum by acting, in matters purely legislative, by resolution instead of by bill. The latter is the consequence in the instant case, if the argument of the learned *Attorney General* is to be sustained. But we are not put to the extremity of holding that the legislature may not, in matters of ratification, act by resolution, for there is a high road of reason leading down to a true result.

The contention that a resolution, although it may have the force and consequence of a formal legislative enactment and affect the people in their civil and political rights, cannot be referred arises from a misconception of the term. This case sounds in fundamentals, not in definitions. It is not the resolution, but the *act* of the legislature in adopting it that is to be referred. A resolution, like all acts of the legislature, is to be measured by the end accomplished. It is true

that we have no provision in our constitution providing for the passage of resolutions, even in the formal matters in which the legislature has throughout the entire history of our territory and state been wont to act, but it is just as evident that there is no limitation upon the power of the legislature to act by resolution.

The constitutions of some of the states and the constitution of the United States (section 7, article 1) permit or recognize the practice of acting by resolution, and some of them limit its uses. It has been held, if the constitution is silent, as ours is, that legislation cannot be effected by that method. *Boyers v. Crane*, 1 W. Va. 176; *State ex rel. Attorney General v. Kinney*, 56 Ohio St. 721, 47 N. E. 569; *Barry v. Viall*, 12 R. I. 18.

And were we considering a matter involving private right arising in or out of the laws of this state, we could not question the authorities just cited; but they are not applicable for the reason that the authority to act in the matter of a proposed amendment to the constitution of the United States does not arise in or out of the constitution of the state, but arises out of the Federal constitution, and any act, whether it be by resolution or by bill, on the part of the state legislature must be held to be a sufficient expression of the legislative will unless Congress itself challenges the method or manner of its adoption. It is upon this principle that the supreme court of the United States has held that the question whether the referendum does violence to the constitution of the United States is non-justiciable, holding that the question whether it deprives the government of a state of its representative character, thus violating the guarantee of a republican form of government, is a question for Congress and not for the courts. The power to question the manner of adoption being in Congress and not in

the courts, the contention that the legislature had no power to act by resolution is non-justiciable; but this holding does not foreclose an inquiry as to the legislative character of the thing done.

It may be that my argument is not entirely clear. If so, we may profitably resort to an illustration. The people of the state of Washington have, by expression of their reserved right to legislate upon all proper subjects of legislation, declared the policy of this state to be against the barter and sale of intoxicating liquor within the state and, by subsequent laws, that we as citizens of a sovereign state are opposed to the use of intoxicating liquor by any of our citizens. The original law by its accretions has become what is popularly called, in the nomenclature of the Anti-Saloon League, "bone dry." This the people did of their own free will and accord and by the assertion of an hitherto unused power. Let the question occur, Can their act be undone by any plan, power, or authority less or other than the power that established the present state of the law? Keeping in mind our present "bone dry" condition, or plight, if that term be preferred, suppose the Congress of the United States should propose an amendment to the Federal constitution providing that it shall hereafter be *lawful* to ship into and sell in all of the states of the Union wines and beers containing not to exceed a certain minimum of alcohol—that it has the power so to do will not be denied. Then suppose that the state legislature did, by resolution, as in the present instance, ratify the amendment, and that it was ratified by a sufficient number of states only, including our own, to meet the demands of the Federal constitution. We would then have a law that was not a law before, that would wipe out *pro tanto* the present law; that would work such an exception to it that so far as the policy of our citizens had been expressed by

their direct vote, would defeat its purposes. In such event—and it is a reasonable postulate—would it be urged for one moment that the people of this state could be denied a right of referendum to determine for themselves under their reserved powers whether they desired their own law to be thus overcome? Would they have to stand by helplessly while the fruits of their victory were swept away and their sovereignty surrendered in degree by resolution of the legislature?

I opine that we would find some way to declare that the right to refer the matter to the people who had theretofore exercised their reserved power upon the very subject of the proposed legislation could not be thus defeated. It is no argument to say that a referendum in that event would operate to promote a good cause, while this demand comes from those who would defeat all liquor legislation. We are here to declare the law, not to maintain or defend policies, and it is enough to say that the relator is within the law as declared by the whole people and, as such, his right should not in conscience be denied. We cannot fit a rule to meet a particular case; it must apply to all alike, whatever the cause and whatever the character of those who invoke it.

The final and, as we believe, the principal ground of opposition is that the amendment, being submitted under article V of the constitution of the United States, is a Federal question in the sense that state laws and state constitutions have no bearing upon or relation to the issue.

It is argued that, inasmuch as article V of the constitution of the United States provides that a proposed amendment "shall be valid to all intents and purposes, as part of this constitution, when ratified by the *Legislatures* of three-fourths of the several states, or by

conventions in three-fourths thereof," etc., the people have hitherto fixed the manner and form of ratification, against which the reserved power of the people of a sovereign state may not prevail. If we are to stand upon the word "legislatures," if that word, and that alone, is the Alpha and Omega of our inquiry, it follows that the controversy is at an end, but we are cited to no instances where a great question involving the political rights of a people have been met by such technical recourse—where any court has so exalted the letter or so debased the spirit of the law.

In *Noble State Bank v. Haskell,* 219 U. S. 104, Ann. Cas. 1912 A 487, 32 L. R. A. (N. S.) 1062, Justice Holmes frowned upon a like invitation, saying:

"We must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. . . . judges should be slow to read into the latter [the Constitution of the United States] a *nolumus mutare* as against the law-making power."

It may be set down as a truism that the Congress of the United States has no concern of the manner in which the people of the several states pass upon the proposed amendment. It is the act of ratification or rejection by the legislative power in a state, and not the manner of doing, that makes for the result to be accomplished.

It may be true that it might have been provided that amendments could be made directly by Congress, and the submission of amendments for ratification or rejection by the legislatures of the several states at all was a matter of grace upon the part of the whole people when the constitution was adopted, but we would

incline to the opinion that the right to pass upon proposed amendments should be treated as a reservation in the several states of the right to express their legislative will in the manner in which they had then provided or might thereafter provide and, when so regarded, as a compact between the states and the Federal government.

It is provided in the Federal constitution that proposed amendments shall be ratified by the legislatures of the states or by conventions assembled for the purpose of considering them. It cannot be urged successfully that the framers of the constitution used the words "legislatures" and "conventions" as terms describing then present institutions, for it is well known that, at the time the constitution was adopted, some of the states did not have legislative assemblies.

Article V can mean no more than this: that no amendment shall be adopted unless it is sanctioned by the supreme legislative power of a sufficient number of the commonwealths, whether such ratification be by legislative assembly, convention, or such other method as might thereafter be adopted by the people in the several states.

If we hold that the words "legislatures" and "conventions" do not control the plain purpose and spirit of article V—that is, that the people shall pass upon a proposed amendment by their representatives, if that be the plan provided by them at the time of its submission, or, if not, under such other plan of expressing their will as may not be offensive to the Federal constitution—we are on solid ground. For the framers of the constitution had well in mind—for they had lived in that time when our political system was being fashioned into concrete form—they understood, as we sometimes forget—that

"The theory of our political system is that the ultimate sovereignty is in the people, from whom springs all legitimate authority." Cooley, Constitutional Limitations (6th ed.), p. 39.

Wherefore it may be said that it is the meaning and intent of article V that an amendment to the constitution of the United States shall not become effective until it has been ratified by the legislative authority of a sufficient number of the states, and it should not be held that a ratification or rejection by a popular vote under the referendum clause of a state constitution would be contrary to the provisions of article V, unless it can be said, under sound rules of construction, that the referendum is offensive to the constitution of the United States.

The people of several of the states, having the sovereign right of self-government, excepting only as they may have yielded that right under the constitution of the United States and its amendments, have adopted the referendum as a rule of government, and the only objection that has ever been urged, or that could have been urged against it, is that it violates section 4, article IV, of the constitution guaranteeing to every state a republican form of government. The supreme court of the United States has held that it does not so offend. *Pacific States Telephone & Telegraph Co. v. Oregon,* 223 U. S. 118.

The fault of disassociating a word or correlative words from the text of a written law and premising a judgment without the warmth of the spirit of that law may be illustrated. If we are wrong it may well be that a state might, and withal unwittingly, put it beyond its power to pass upon a proposed amendment to the Federal constitution. If the people of this state had, when they adopted the referendum, provided for the abolition of our legislative assembly (as they might

have done), and had provided that all laws should thereafter be initiated by and voted upon by direct vote of the people, or that the legislative functions of the state should be exercised by a council of three and that all their acts should be subject to a referendum at the next succeeding general election, it would follow, under the theory advanced to defeat a referendum in this case, that a proposed amendment could not be either ratified or rejected in the state of Washington, for there would be no "legislature" or "convention" in the sense in which those terms are employed in the Federal constitution.

Significance is placed on the word "conventions," it being contended that, if the word "legislatures" had been used alone, our argument might seem plausible, but the added word "conventions" necessarily implies that Congress had in mind a representative body and not legislative authority; but we are inclined to take a broader view.

It was doubtless intended that "legislatures" should mean one thing; that is, the legislative authority of the state; and "conventions" another thing, an extraordinary representative body convened by and in the state for the sole purpose of passing upon the proposed amendment to the Federal constitution. If it had no other intention in adopting the term "legislatures"—in specifying one of the instrumentalities for passing upon the proposed amendment—than to express the idea of legislative power, of whatever that power consists, then it must be deemed to mean all the branches or component parts of that power, which have included the qualified voters also if they so desire. Inasmuch as the constitution was formulated not for a day or a year, but for all time, except as amended, we may consider that it contemplated the same kinds

of state legislative bodies then in existence and known to the framers, or any other kinds of legislative bodies that should come into existence in the future.

One of the important ideas governing the framers of the national constitution was that amendments to that instrument should be ratified by the states as units, recognizing and preserving the integrity and sovereignty of the states as parties to the compact creating and continuing that constitution. Doubtless there was no other idea prevailing in providing for adoption of amendments by the "legislatures" or "conventions" of three-fourths of the states than that. Certainly it was, and is, of no concern to the others what sort of legislature any particular state has, so long as it conforms to the scheme of a republican form of government.

We have preferred to meet the question upon the plane of broad reason, having in mind the spirit and policy of the referendum, but we are not without competent authority to prove that the manner or the name attached to the legislative power of the state, whether it be a representative body or the people themselves, is of no concern to the Federal government.

In *State ex rel. Schrader v. Polley*, 26 S. D. 5, 127 N. W. 848, it was contended, inasmuch as it was provided in the Federal constitution (art. 1, § 4) that

> "The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the Legislature thereof . . .,"

the relator was entitled to have his name go upon the ballot at a general election under an act of the legislature but against which a referendum petition had been filed. And it would seem, if the argument of the respondent is sound, that the prayer of the relator in that case should have been granted, for there

the constitution of the United States provided that the *legislature should prescribe the times, places and manner* of holding elections, while in the instant case the provision is that the amendment shall be ratified by the legislatures.

After noting the tenth amendment to the constitution that "the powers not delegated to the United States, . . . are reserved to the states respectively or to the people," which, by the way, is a declaration that the people of the several states may function their legislative power in their own way, especially so when the ninth amendment, "the enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people," is regarded—for the right to legislate directly or by representative bodies is a right assuredly retained, and being retained may be exercised in the form and manner provided by the people of a state—the court says:

"We are also of the opinion that the word 'Legislature,' as used in section 4, art. 1, of the federal Constitution, does not mean simply the members who compose the Legislature, acting in some ministerial capacity, but refers to and means the lawmaking body or power of the state, as established by the state Constitution, and which includes the whole constitutional lawmaking machinery of the state. State governments are divided into executive, legislative, and judicial departments, and the federal Constitution refers to the 'Legislature' in the sense of its being the legislative department of the state, whether it is denominated a Legislature, General Assembly, or by some other name. Under section 1, art. 3, of the state Constitution, it will be observed, the people of this state have reserved to themselves, as a part of the lawmaking power, the right to vote by referendum, upon any law passed by the Legislature, with certain specified exceptions, prior to the going into effect of such law. That the excep-

tions mentioned are 'such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government or its existing state institutions.' It is clear that said chapter 223 is not within any of these exceptions. Under the Constitution of this state, the people, by means of the initiative and referendum, are a part and parcel of the lawmaking power of this state, and the Legislature is only empowered to act, in accordance with the will of the people as expressed by the vote, when the referendum is properly put in operation. The term 'Legislature' has a restricted meaning which only applies to the membership thereof, and it also has a general meaning which applies to that body of persons within a state clothed with authority to make the laws (Bouvier's Law Dic.; Webster's Dic.; 18 Am. & Eng. Ency. 822; 25 Cyc. 182), and which, in this state, under section 1, art. 3, Const. S. D., includes the people. . . .

"In *Baldwin v. Trowbridge,* 2 Bart. Contested El. Cas. 46, the minority report in presenting the legal side of the controversy shows the following pertinent language which meets with our approval: 'But it was argued that this power was by express terms left, not to the states simply, but to the Legislatures thereof, and that this is such a limitation upon the people of the states that they have now power to restrict their Legislatures in the exercise of this right, conferred upon them by the federal Constitution; but I submit, with all due respect, that not only the history and object of the section under consideration, but the proper definition of the term "Legislature," as therein used, show the fallacy of this construction. The "Legislature" of the state, in its fullest and broadest sense, signifies that body in which all the legislative power of a state reside, and that body is the people themselves, who exercise the elective franchise, and upon their power of legislation there is no limitation or restriction, except such as may be found in the federal Constitution, or such as they themselves may provide by the organic law of the state.' "

The writ was denied.

State ex rel. Davis v. Hildebrant, 94 Ohio St. 154, 114 N. E. 55, is likewise to the point. The general assembly, being the representative legislative body of the state of Ohio, passed an act on May 27, 1915, redistricting and apportioning the state into several Congressional districts. The state had theretofore, by an act passed April 28, 1913, been districted and divided. A sufficient number of the people filed a petition for a referendum of the later act. It was submitted to the electors of the state and was rejected by a majority of the voters. It was contended that the act of 1915 was a valid act and was not a subject of referendum, because sec. 4, art. 1 of the Federal constitution provided that the times, places and manner of holding elections for members of Congress, "shall be prescribed in each state by the legislature thereof." The court put the question:

"Does the term 'legislature,' as used in Article I, Section 4 of the Federal Constitution, comprehend simply the representative agencies of the state, composed of the members of the bicameral body, or does it comprehend the various agencies in which is lodged the legislative power to make, amend and repeal the laws of the state, including the power reserved to the people empowering them to 'adopt or reject any law' passed by the general assembly under the provisions of Section 1, Article II of the Constitution of Ohio?"

After reference to the state constitution, which is in form similar to the seventh amendment to our own, the court says:

"These various sections disclose that, while the legislative power has been delegated to the bicameral body composed of the senate and house of representatives, the people of Ohio have by the aforesaid provisions of their constitution determined the manner by which such legislative power may be exercised, under what circumstances the laws passed by it may be-

come operative without an appeal to the people, and have further imposed the conditions under which such laws may become operative or inoperative as they may have been adopted or rejected by the popular vote designated as the 'referendum.'

"While Article I, Section 4, of the United States Constitution is controlling upon the states in so far as it grants the legislature of the state authority to prescribe the times, places and manner of holding elections, this is the *quantum* of the federal grant. The character of the legislature, its composition and its potency as a legislative body are among the powers which are, by Article X of said Constitution, 'expressly reserved to the states respectively, or to the people.'

"Webster's New International Dictionary defines 'legislature' as follows: 'The body of persons in a state, or politically organized body of people, invested with power to make, alter and repeal laws.'

"The Century Dictionary defines the same term as follows: 'Any body of persons authorized to make laws or rules for the community represented by them.'

"Under the reserved power committed to the people of the states by the federal constitution, the people, by their state organic law, unhindered by federal check or requirement, may create any agency as its lawmaking body, or impose on such agency any checks or conditions under which a law may be enacted and become operative. Acting under this recognized authority, the Ohio constitution, prior to the adoption of the amendment of 1912, provided that the *'legislative power'* of the state should be vested in the general assembly, consisting of a senate and house of representatives. The same provision now exists, but by the adoption of the amendment of 1912 the people expressly limited this legislative power by reserving to themselves the power to reject any law by means of a popular referendum. The lawmaking body, the legislature, as defined by lexicographers, comprehends every agency required for the creation of effective laws. It cannot be claimed that the term 'legislature' necessarily implies a bicameral body. When the term was

originally embraced in the constitution the legislatures of Pennsylvania, Georgia and Vermont consisted of but a single house, with a second body in each, called an executive council. These states later abolished their councils and established a legislature consisting of two branches, and such is the character generally of the various state legislatures today. 1 Bryce's American Commonwealth, page 461, note.

"The constitutional provision relating to the election of congressmen, conferring the power therein defined upon the various state legislatures, should be construed as conferring it upon such bodies as may from time to time assume to exercise legislative power, whether that power is lodged in a single or two-chambered body, or whether the functions of the latter be curbed by a popular vote or its enactments approved by a referendum vote."

This case went to the supreme court of the United States. (*State ex rel. Davis v. Hildebrant,* 241 U. S. 565.) That court passed the question of the power of the state to adopt and use the referendum as an instrument of legislative will "as obvious," holding that the state law which had been made subject to the referendum was valid and operative; a conclusion manifestly unsound, if the word "legislature" means a bicameral body and that meaning is inflexible under the constitution of the United States; for, if that were so, the states would have no power to prevail against it, whatever the form of their expression may have been.

But it is said that the supreme court may be unsound in that respect, but is sound in result because the Congress had passed an act, ch. 5, 37 Stat. 13, making the referendum a component part of the legislative authority empowered to deal with the election of members of Congress. There is nothing in the act of Congress which

"prevents the people of a State from reserving a right of approval or disapproval by referendum of a state act redistricting the State for the purpose of congressional elections" (syllabus).

But if it were so, it would not avail respondent, for the power of the state to act comes from the constitution and not from any act of Congress. To give such effect to an act of Congress would be to say that Congress might by act amend the constitution. Chief Justice White disposed of the controversy when he defined the issue,

"The right to this relief was based upon the charge that the referendum vote was not and could not be a part of the *legislative* authority of the State and therefore could have no influence on the subject of the law creating congressional districts for the purpose of representation in Congress."

and said,

"The court below adversely disposed of these contentions and held that the provision as to referendum was a part of the legislative power of the State. . . . As to the state power, we pass from its consideration, since it is obvious that the decision below is conclusive on that subject and makes it clear that so far as the State had the power to do it, the referendum constituted a part of the state constitution and laws and was contained within the legislative power and therefore the claim that the law which was disapproved and was no law under the constitution and laws of the State was yet valid and operative, is conclusively established to be wanting in merit."

It could not have been so held if the act of a *legislature,* as distinguished from legislative authority, was essential under section 4. If that were so, the court must have denounced the referendum in that and all cases where the constitution leaves a matter to the

"legislature" and refused to follow the state court, for its first duty is to the constitution.

Our attention is called to a decision of the supreme court of Oregon in *Herbring v. Brown,* 180 Pac. 328. The premise of the decision is that the reserved power of the people is limited to a review of "any *act* of the legislative assembly," and that the word "act" was used having in mind the exercise of the legislative function as outlined in the original draft of the state constitution, and that the word "act" did not comprehend a joint resolution.

We have already demonstrated that our constitution is more comprehensive. The decision does not appeal to us for another reason. Its basis is fundamentally unsound in that it proceeds upon the theory that the right of the people to legislate upon the question rests in the antecedent provisions of the state constitution, whereas the right comes from the constitution of the United States.

Other questions were discussed by counsel. We have considered them and are agreed that they are not controlling.

The writ will issue.

MOUNT, MAIN, and HOLCOMB, JJ., concur.

PARKER, J. (dissenting)—I am unable to concur in the majority opinion of the court. The necessity of a prompt disposition of this case, in view of the decision of a majority of the court to grant the writ prayed for, prevents me setting forth, at the length I would like to, my views upon the question presented. I will content myself with the following brief observations, which I think could be materially strengthened in support of the conclusions I have reached, by a more detailed discussion.

The resolution of Congress here in question, reads:

"JOINT RESOLUTION.

"Proposing an amendment to the constitution of the United States.

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each house concurring therein), That the following amendment to the constitution be, and hereby is, proposed to the States, to become valid as a part of the constitution when ratified by the Legislatures of the several States as provided by the constitution:

"ARTICLE —.

"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Sec. 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation.

"Sec. 3. This article shall be inoperative unless it shall have been ratified by an amendment to the constitution by the legislatures of the several states, as provided in the constitution, within seven years from the date of the submission hereof to the States by the congress." U. S. Stats. 1918, Sess. II, ch. 212, 40 Stat. 1050.

The constitution of the United States, in the fifth article thereof, prescribes the manner of proposing and ratifying amendments to that instrument as follows:

"The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either case, shall be valid to all intents and purposes,

as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; . . ."

In the sixth article of that instrument, we also read:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

It is therefore plain that the above quoted portion of the fifth article of the Federal constitution is the supreme law of the land touching the subject of amending that instrument. The several states, by the express provisions of that article, have as completely surrendered the power to prescribe a different manner of amending the Federal constitution as they have surrendered to the Federal government the sovereign powers enumerated in that instrument to be exercised by the Federal government. It is to be noted that the Congress of the United States has the power to prescribe either of two ways in which the several states shall voice their ratification of a proposed amendment to the Federal constitution, to wit: "by the legislatures," or "by conventions" held in the several states for that purpose; and that Congress has in its proposal of this amendment expressly provided that it "shall be inoperative unless it shall have been ratified as an amendment to the constitution by the legislatures of the several states . . ." In other words, Congress has submitted this proposed amendment for ratification or rejection to the legislatures of the several states, instead of to conventions to be held therein.

It is contended in behalf of the relator that the word "legislatures," as used in the above quoted portion of the fifth article of the Federal constitution, means not alone the law-making representative body of the several states, called "legislature" or some other name of the same import, but the entire law-making body of the state, though such body include the individual electors of the state, when by its constitution such electors possess the power of direct legislation through the initiative and referendum, as they do in the state of Washington under its constitution by virtue of the seventh amendment thereto, reading, in so far as we need here notice its language, as follows:

"The legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called the legislature of the state of Washington, but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section or part of any bill, act or law passed by the legislature."

I am convinced that the ratification by a state legislature of a proposed amendment to the Federal constitution is an exercise of a power which the legislature possesses by virtue of the fifth article of that instrument, and the designation by Congress of that method of ratification in pursuance of the power given to Congress by that article, and that the legislature is not acting in pursuance of any power given to it by the state constitution, except in so far as the legislature may owe its existence to the state constitution. I cannot escape the conclusion that such act of ratification by the legislature is not law-making legislation for the state and its people under its constitution, but

is simply the casting of the vote of the state and its people in the manner prescribed by the Federal constitution and the direction of Congress made in pursuance thereof, as to whether or not the proposed amendment of that instrument shall be ratified. Such act of a state legislature, it may be conceded, is an act or participation in legislation; but I think it is an act of participation in purely national legislation, and is neither state legislation, nor an act of participation in state legislation. I may further observe that the act of ratification would, as I view it, be in substance identical in character, whether done by the legislature by a vote upon an informal motion, by a formal resolution, or by a formal bill as in the enactment of ordinary state laws; and that the form of ratification by the legislature is of no moment in the determination of whether or not the legislative act of ratification is referable to a direct vote of the people. Of course, the legislature might call for an advisory vote of the people before finally acting, but that is not this case.

In Jameson, Constitutional Conventions (4th ed.), § 583, that learned author says:

"The power of a state legislature to participate in amending the Federal Constitution exists only by virtue of a special grant in that constitution. It is a power which it could not assume under any notion of a general right to legislate, for that right is confined within state limits, and to the enactment of ordinary laws."

Our problem here is, What body of persons compose the legislature, within the meaning of that word as used in the fifth article of the Federal constitution? rather than the question of where the whole of the state's legislative power resides. Recurring to the language of that article, and having in mind what

must have been the commonly accepted meaning of the word "legislature" when originally placed in that article of the constitution, I am convinced that it means that body of persons composing the ordinary representative law-making body of the state. The fact that Congress is given power to submit proposed constitutional amendments to conventions, manifestly meaning representative conventions, in the several states, as well as to the legislatures thereof; the manner in which the several states and their people express their choice for president and vice-president of the United States through chosen representatives called electors, instead of by direct vote; the manner in which the several states expressed their choice for United States senators through chosen members of their respective representative law-making bodies called "legislature," or some other name of the same import, as provided by the Federal constitution until recent years; the fact that the Federal constitution, until the recent amendment thereto providing for the election of senators by direct vote of the people, never contained any provision for the people of the respective states voicing their will by direct vote upon any Federal or national question wherein the decision of a state, or the people thereof as a whole, was called for under some provision of the Federal constitution; and the history of the times touching the original framing and adoption of the Federal constitution, to my mind argue all but conclusively that it was not the intent or purpose of the framers of that instrument that amendments thereto should be ratified by the several states or the people thereof, other than by an expression of their will in that behalf through their representative legislative bodies called "legislature," or some other name of the same import, or through

representative conventions held in the several states for that purpose.

Counsel for the relator call to our attention and invoke in his behalf the decisions of the supreme court of South Dakota and Ohio, in *State ex rel. Schrader v. Polley,* 26 S. D. 5, 127 N. W. 848, and *State ex rel. Davis v. Hildebrant,* 94 Ohio St. 154, 114 N. E. 55, holding, in substance, that the word "legislature," as used in section 4 of article 1 of the Federal constitution, means and comprehends the entire legislative power of the respective states, including not only the legislative power possessed by the representative legislative body of each state, but also the legislative power which may be reserved in the people of a state by its constitution, to be exercised by the initiative and referendum, as such power is reserved in the people of South Dakota and Ohio by their constitutions, in substance the same as such power is reserved in the people of our state by the above quoted portions of the seventh amendment to our constitution. Section 4 of article 1 of the Federal constitution, the interpretation of which was involved in those decisions, reads:

"The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but the congress may at any time by law make or alter such regulations, except as to the places of choosing senators."

The question in each of those cases was as to whether or not an act passed by the representative legislative law-making body of the state, called "legislature" in South Dakota, and "general assembly" in Ohio, dividing the state into congressional districts and providing for the election of representatives in Congress therefrom, was subject to a referendum vote of the people of the state under the initiative and ref-

erendum provision of its constitution; those courts deciding that such an act was subject to a referendum vote of the people. It seems to me at once apparent that there is a marked distinction between the legislative power reserved to the several states by the provisions of section 4, article 1, of the Federal constitution, and the provisions of article 5 of that instrument, providing the manner in which the respective states and the people shall express their ratification of proposed amendments to that instrument. The former is the enactment of law, the prescribing of a rule of conduct, by the sovereign legislative power of the state, subject, of course, to be superseded by laws which may be enacted by Congress, but nevertheless within itself an act of legislation, completed or to be completed by the sole legislative power of the state; and the fact that such legislation may have to give way to some higher law which Congress may enact, does not in the least change the fact that it is an act done by the legislative power of the state, in the doing of which no other state or power has any voice whatsoever. The latter is but the casting of the vote of the state and its people upon the question of amending the Federal constitution, in the manner provided for by the terms of that instrument; a question not of state legislation, but of national legislation, in which each state has but one vote. I think that the South Dakota and Ohio decisions are of no controlling force in the solution of this problem.

It has been suggested that a state constitution might not create any representative law-making body such as is commonly called "legislature," but provide for the exercise of the whole of the state's legislative power by direct vote of the people, a thing I concede to be not impossible; and that such a state might de-

cline to provide for the calling of a convention to act upon a proposal to amend the Federal constitution. I am quite unable to see, should my view of the question here presented prevail, that such a condition would in the least impair the right and power of Congress to obtain, in an orderly and lawful way, an expression of the will of the people of such a state touching a proposed amendment to the Federal constitution, since Congress is plainly given the power to submit such a proposal to conventions in the several states and to provide the manner of electing delegates to, and the calling of, such conventions, all of which could be readily done by Congress wholly apart from state constitutional and statutory law.

It is contended in behalf of the relator that the secretary of state should not now be permitted to refuse to file the petition, give a serial number thereto as a referendum measure, transmit a copy thereof to the *Attorney General* for the preparation of a ballot title, and perform the other acts required of him by law looking to the submission of referendum measures to the people; and that we should not at this time entertain the defense made in the secretary's behalf that the proposed measure is not referable to the people. Counsel for the relator call to our attention and rely upon that line of decisions holding, in substance, that the courts will not entertain the question of the constitutionality or validity of a proposed initiative or referendum measure in a proceeding to compel an officer to perform, or refrain from performing, some act prescribed by law to be performed by him looking to the submission of such measures to the people.

Our real concern here is not with the constitutionality or validity of the joint resolution of our legislature here in question. The real reason why the secretary of state should not be compelled to perform

the acts demanded of him by the relator is that the question of the ratification of a proposed Federal constitutional amendment is not one to be finally decided by direct vote of the people of the several states, but by the vote of the states and the people thereof, expressed through their representative law-making bodies or representative conventions held in the several states for that purpose. No decision of any court has come to our notice holding that an officer whose duty it is to perform acts looking to the submission to the people of initiative and referendum measures can be compelled by mandamus to perform any act looking to the submission of a question to the people which under no circumstances is referable to a direct vote of the people for final decision as an initiative or referendum measure. The demand here made by the relator upon the secretary of state is, in its last analysis, a demand that he perform an act which I think he is not legally required to perform. Our decision in *State ex rel. Case v. Howell,* 85 Wash. 281, 147 Pac. 1162, and *State ex rel. Case v. Howell,* 85 Wash. 294, 147 Pac. 1159, Ann. Cas. 1916A 1231, are in harmony with this view of the law, though this exact question was not there presented to the court.

I am of the opinion that the writ should be denied.

MITCHELL, J., concurs with PARKER, J.

TOLMAN, J. (dissenting)—I thoroughly and heartily agree with the construction placed upon our state constitution by the majority, but am convinced that the question here involved is one upon which our state constitution and laws have no bearing, and that the manner of amending the Federal constitution is fixed by that instrument itself. I therefore concur with Judge Parker.

FULLERTON, J. (dissenting)—While I concur in the conclusion reached by Judge Parker, I do so for a very different reason than the reason given by him. I am of the opinion that there has been no valid ratification of the proposed constitutional amendment. If this view be sound, it follows, as matter of course, that there is nothing to submit under the referendum clause of the constitution to the vote of the electorate.

I need not state at length the reasons which lead me to think there has been no valid ratification of the amendment. It is sufficient to say that, in my opinion, the term "legislature," as used in the fifth article of the Federal constitution, has reference to the legislative power of the state, not to that part of the legislative power technically designated in the constitution as the legislature. The two houses of the legislative branch of the state government cannot, therefore, ratify a proposed amendment to the Federal constitution by a joint resolution; this for the reason that they do not constitute the sole legislative power. The governor, by his right of approval or disapproval of legislative enactments, and the people, through the referendum, constitute a part of that power, and the participation of the one in every instance, and the participation of the other if it so desires, is necessary to the passage of laws. That the ratification of the proposed amendment is the enactment of a law seems to me only necessary to be stated to be conceded. It is a surrender of a part of the sovereignty of the state, and it makes that law in the state which was not law before. The state constitution points out the procedure for the enactment of laws. That procedure has not been followed in this instance; hence my conclusion that there has been no valid ratification of the amendment.

I am aware that the majority meet my objection by arguing that the power to amend the constitution of the United States emanates from that constitution, and since it prescribes no form for state action, any suitable form may be adopted which expresses the will of the state. But this line of reasoning overlooks the language of the constitutional provision authorizing amendments. As shown in both the majority and dissenting opinions, the Congress, in submitting proposed amendments to the constitution for ratification by the states, may adopt either one of two methods for such ratification; it may submit the amendment to the legislatures of the several states, or it may submit it to conventions of the several states.

If the majority contention be sound, a submission to the legislature would be legally ratified if ratified by a convention, and if submitted to a convention, would be legally ratified if ratified by the legislature. This form of reasoning is, to my mind, unsound.

I think, instead of waiving form, form is expressly insisted upon; and since the submission is in this instance to the legislature, the legislature must act in the manner it is empowered to act by the laws creating it, else there is no valid ratification.

That I am not alone in this view is shown by the cases supporting it cited by the majority. I cannot agree with the majority, however, in thinking them unsound. To my mind, the reasoning upon which they are founded is unanswerable.

I think the writ should be denied.

MACKINTOSH, J. (concurring)—By the adoption of the initiative and referendum amendments the people of this state became a part of the legislative branch of the state government, and all legislative actions, except those especially exempted, are subject to their

participation. The reasons which have led up to this modern form of legislation are as set forth in Judge Chadwick's opinion and, upon both authority and reason, no curtailment of this power should now be judicially sanctioned. If the people have declared their intention to assert their authority over the legislature in acts many of which are of temporary or small importance, it was surely their intention to preserve to themselves the right of reviewing legislative action of lasting and great importance, and within this category assuredly fall all actions dealing with the amendment of the Federal constitution. It would be idle to say that the right of referendum could be exercised in the unimportant matters and not in the important.

The dissenting opinion of Judge Parker indulges in altogether too narrow and restricted an interpretation of the right of referendum, and seems to be entirely out of harmony with the course of the decisions of this court upon this and kindred matters arising under laws affecting modern legislative and governmental functions. By strict adherence to dictionary definitions, this dissenting opinion crushes the spirit of the constitutional provisions under consideration, and if it were the prevailing view in this case, would mark a step backward by a court which has come to be recognized as rather liberal in its interpretation of legislation aimed at the correction of social and public evils. It is clear to my mind that the law contemplated the submission to the people of all legislative acts, using that word in its broad signification, and it is also clear that the constitution of the United States, in providing for amendments thereof, intended that those amendments should by Congress be submitted to the legislative powers of the various states, and that the term "legislature," as used in that broad way, was not

meant to refer merely to what is commonly called a legislature.

The view expressed by Judge Fullerton appears to me to be equally as untenable as those written by Judge Parker and those agreeing with him. As I understand it, that view is that because the legislature ratified the proposed constitutional amendment by joint resolution instead of by an *act*, that therefore there has never been any ratification by the state of Washington of the proposed prohibition amendment. The answer to this has been admirably expressed in the majority opinion, and it would appear to be self-evident that the technical manner of signifying the agreement of the legislative body is a question which should be determined by the Congress of the United States and is not a matter of our concern.

I am compelled by the majority opinion to concur in the result therein arrived at.

[No. 14629. Department Two. May 28, 1919.]

ALBERT PICCO *et al., Appellants,* v. NED RONEY *et al., Respondents.*[1]

APPEAL AND ERROR (50)—FINAL ORDERS—GRANTING NEW TRIAL. An order granting a new trial is not appealable as a final order.

SAME (181)—TIME FOR TAKING—NEW TRIAL. Appeal from an order granting a new trial must be taken within fifteen days after entry or notice, under Rem. Code, § 1718, limiting the time for appeals from any order other than a final one.

SAME (179)—TIME FOR TAKING—COMMENCEMENT OF PERIOD—GRANTING NEW TRIAL. Where an order granting a new trial recites the entry and allowance of exceptions at the time of signing the order and making the decision, the time for taking an appeal begins to run from entry of the order.

SAME (326)—RECORD—FAILURE TO FILE IN TIME. Under Rem. Code, § 1729, relative to filing a transcript of record, an appeal must be dismissed where no excuse is given for delay in filing the transcript within ninety days and it was not supplied until after motion to dismiss the appeal.

Appeal from an order and judgment of the superior court for King county, Gilliam, J., entered May 23, 1917, granting a new trial as to one defendant, and granting a dismissal, notwithstanding the verdict of a jury in favor of the plaintiffs, as to the other defendant, in an action in tort. Dismissed.

Vince H. Faben, for appellants.

A. J. Falknor and *R. G. Sharpe,* for respondents.

PER CURIAM. — Appellants instituted this action against respondents, as attorneys at law in copartnership, to recover damages for malpractice. The cause was tried before a jury, which brought in a verdict of $8,500 against respondents. Respondents moved for a new trial, a directed verdict, and for judgment notwithstanding the verdict, in favor of respondent Roney. On May 12, 1917, the court granted the motion

[1]Reported in 181 Pac. 522.

for new trial in behalf of respondent Loveless, and granted a judgment of dismissal notwithstanding the verdict, in favor of respondent Roney. This order and the judgment were signed and entered May 23, 1917. The appellants assign as errors the granting of the new trial in favor of Loveless and the granting of judgment *non obstante veredicto* in favor of Roney. Appellants served notice of appeal on July 28, 1917.

At the threshold we are confronted with two motions by respondents to dismiss the appeal: (1) Loveless moves that the appeal be dismissed on the ground that the appeal from the order granting a new trial was not made until sixty-six days after the entry of said order. (2) Respondents move that the appeal be dismissed on the grounds, (a) that appellants have failed and neglected to diligently prosecute their appeal; (b) that appellants neither filed, nor caused to be filed, either in the lower court or in this court, a transcript on appeal until February 27, 1918, and failed to serve and file their abstract of the record and opening briefs within the time allowed by statute.

An order granting a new trial is not a final order and is not appealable unless allowed by statute. Rem. Code, § 1716, subd. 6, grants appeals on an order of new trial. Rem. Code, § 1718, provides that an appeal may be taken

"from any order, other than a final order, from which an appeal is allowed by this act, within fifteen days after the entry of the order, if made at the time of the hearing, and in all other cases within fifteen days after the service of a copy of such order, with written notice of the entry thereof, upon the party appealing, or his attorney."

The formal order of May 23, 1917, granting a new trial to respondent Loveless, recites:

"The plaintiffs by their attorney at the time of the signing of the order, and at the time of the ruling

and the decision, having taken their exception to the order and the judgment granting a new trial to the defendant Loveless, duly entered their exceptions thereto, upon the ground and for the reason that the same is contrary to the law and not justified by the evidence and the records in the case, and their exception was duly entered and allowed. Done in open court, this 23 day of May, 1917. '————' Judge. Filed in open court May 23, 1917. '————' Clerk, by '————' deputy."

This seems to us to show that appellants' attorney was present at the hearing and entry of the order. Under the statute quoted, *supra,* we must conclude that the service and filing of the notice of appeal on July 28, 1917, as to the order granting a new trial is not timely, and respondent Loveless' motion to dismiss the appeal in that respect must be granted.

Appellants' transcript on appeal was filed in the lower court February 28, 1918, and in this court March 1, 1918. Respondents, on February 13, 1918, had served appellants with the motion to dismiss the appeal. In *Ellis v. Bardin,* 36 Wash. 122, 78 Pac. 677, it was held that, where the appellant fails to file any transcript, or order the same prepared, for more than ninety days, and, after motion to dismiss the appeal, prepared and filed a transcript without giving any excuse for the delay, the appeal will be dismissed for failure to diligently prosecute it. See, also, *Humes v. Hillman,* 39 Wash. 107, 80 Pac. 1104.

Rem. Code, § 1729, provides:

"Within ninety days after an appeal shall have been taken by notice as provided in this title, the clerk of the superior court shall prepare, certify and file in his office, at the expense of the appellant . . . a transcript containing a copy of so much of the record and files as the appellant shall deem material to the review of the matters embraced within the appeal, said transcript to be so prepared, certified and filed,

in the office of the clerk, at or before the time when the appellant shall serve and file his opening brief, as hereinafter provided. Within four months after said appeal shall have been taken by notice as aforesaid, the clerk of the superior court shall at the expense of appellant, send up to the supreme court said transcript together with the original briefs on appeal filed in his office. . . ."

On the strength of the foregoing cases and the statute, no excuse having been given for the delay in filing the transcript on appeal within ninety days, and a motion to dismiss the appeal having been made prior to the time of supplying the same, we reluctantly dismiss the appeal for failure to diligently prosecute it.

A motion is in the record to substitute Herbert Crowder as trustee in bankruptcy in place of the appellants herein. The motion is without merit and will be denied.

Appeal dismissed.

[No. 14869. Department One. May 28, 1919.]

R. PRINS, *Appellant*, v. HOLLAND-NORTH AMERICA MORTGAGE COMPANY, *Respondent*.[1]

LIBEL AND SLANDER — PUBLICATION — ACTS — LETTER TO BRANCH OFFICE. Publication of a libel is the communication of defamatory matter to some third person, and there is no publication by a libelous letter written at the main office of a corporation and sent to its own branch office where it was read only by its own officers and agents.

Appeal from a judgment of the superior court for King county, Frater, J., entered November 22, 1917, upon sustaining a demurrer to the complaint, dismissing an action for libel. Affirmed.

Fred W. Catlett, for appellant.

Ballinger, Battle, Hulbert & Shorts, for respondent.

FULLERTON, J.—The action is for libel. The defendant is a corporation organized under the laws of the Kingdom of the Netherlands, having its principal office at Gorinchem therein. It is engaged in the business of loaning money on first mortgage security. It has a branch office at Seattle, in this state, of which the plaintiff was formerly sole manager, and at the time of the publication claimed to be libelous, was co-manager with one Wabeke. The publication complained of is a letter written by the defendant at its main office and sent to its branch office at Seattle. The letter was written in the Dutch language, and, as translated in the complaint, reads as follows:

"Gorinchem, Oct. 17th, 1916.

"Holland North America Mortgage Co.,

"Seattle, No. 65

"Gentlemen: The accountant has finished the profit and loss account over the first half year. The result

[1]Reported in 181 Pac. 680.

is very regrettable, as you can see from enclosed copy. The profit only amounts to Fl. 885.10. This bad result must be ascribed wholly and totally to the little activity in the investing of the money's in America during the first half year.

"If a considerable amount is not very soon placed on first mortgage, the loss by Dec. 31, next will be considerable. Nearly the total amount of the issue is yet to be loaned out, *this* causes us loss of interest of nearly 4% per annum, and *this* is the cause of the big loss we now have to expect. It looks to us that although there are many good deals that could have been made, we have failed to have a good organization. De Noord Amerikaasche Hyp. Bank at Leeuwarden which has placed this year a considerable greater amount of bonds than we have, is now again advertising that it is selling 5½% bonds. This, it certainly would not do, if it still had considerable sums for investment.

"We trust, however, that our business is now being conducted with a firm hand in the right path and we soon shall receive reports about investments. With very great interest we are looking forward to this.

"Respectfully,

"Holland Noord-Amerika Hypotheekbank,

(Cop) "F. Fernhout—B. Cool."

The letter was received at the branch office at Seattle in due course, and was read by Wabeke and a bookkeeper in the office, both of whom understood the Dutch language. No other publication of the libel is set forth in the complaint.

In his complaint, the plaintiff set forth his relation with the defendant, his sole management of the business in America during the period spoken of in the letter; averred that the letter was written with malice, that it was false and defamatory, and by innuendo sought to show that it charged him with neglect of duty, want of capacity and breach of trust, and hence was *per se* libelous.

To the complaint the defendant interposed a demurrer, which the trial court sustained. The appellant elected to stand upon the complaint, whereupon the court entered a judgment of dismissal with prejudice. The plaintiff has appealed.

The ground upon which the trial court rested its judgment does not appear in the record. It would seem, however, that the judgment can be justified on any one of several grounds. Since we have concluded there was no publication of the libel, within the meaning of the rule relating to such publications, this is the only question we shall discuss.

Publication of a libel is the communication of the defamatory matter to some third person or persons. Here the communication was sent from the main office of the company to its branch office. Until the appellant himself spread the letter broadcast to the world, it does not appear from the complaint that it was exhibited to any one other than the officers and employees of the respondent company, whose very duties in the conduct of the ordinary business of the company brought them in contact with it. Agents and employees of this character are not third persons in their relations to the corporation, within the meaning of the laws pertaining to the publication of libels. For the time being, they are a part and parcel of the corporation itself, so much so, indeed, that their acts within the limits of their employment are the acts of the corporation. For a corporation, therefore, acting through one of its agents or representatives, to send a libelous communication to another of its agents or representatives cannot be a publication of the libel on the part of the corporation. It is but communicating with itself. The corporation can act only through officers and agents, and the officers and agents authorized to act for it are as much a part of the corporation at one place

as at another, and the receipt or perusal of the letter by the corporation officers and agents at Seattle was as much the act of the corporation as was the writing of the letter by an officer or agent at the place of origin of the letter. It is not the publication of a libel for a person to write and mail a libelous letter to the person libeled if he gives it no further publication; and, for a much stronger reason, it is not a publication of a libel for one person to write a libelous letter to himself which he exhibits to no other person. It must follow that a corporation, although it can act only through officers and agents, is not guilty of publishing a libel when it writes a libelous letter at one of its branch offices and mails it to another.

We are aware that the foregoing principle has not met with uniform approval. It is the rule announced, as we read the case, in *Owen v. Ogilvie Pub. Co.*, 32 App. Div. 465, 53 N. Y. Supp. 1033. There it was said:

"The law is elementary that there can be no libel without a publication of the libelous matter. We may assume that this letter was libelous. Was there a publication of it by the corporation, within the meaning of the law? Ordinarily, when a letter is written and delivered to a third person, with the intent and expectation that it shall be read by such person, and it is actually read, the publication is complete. *Youmans v. Smith,* 153 N. Y. 214, 47 N. E. 265. Has such rule application to the facts of this case? The letter was dictated to a stenographer, and was by her copied out, was signed by the manager, was then inclosed in an envelope, and sent by mail to the address of the plaintiff. It may be that the dictation to the stenographer and her reading of the letter would constitute a publication of the same by the person dictating it, if the relation existing between the manager and the copyist was that of master and servant, and the letter be held not to be privileged. Such, however, was not the rela-

tion of these persons. They were both employed by a common master, and were engaged in the performance of duties which their respective employments required. Under such circumstances we do not think that the stenographer is to be regarded as a third person in the sense that either the dictation or the subsequent reading can be regarded as a publication by the corporation. It was a part of the manager's duty to write letters for the corporation, and it was the duty of the stenographer to take such letter in shorthand, copy it out, and read it for the purpose of correction. The manager could not write and publish a libel alone, and we think he could not charge the corporation with the consequences of this act, where the corporation, in the ordinary conduct of its business, required the action of the manager and the stenographer in the usual course of conducting its correspondence. The act of both was joint, for the corporation cannot be said to have completed the act which it required by the single act of the manager, as the act of both servants was necessary to make the thing complete. The writing and the copying were but parts of one act; *i. e.*, the production of the letter. Under such conditions we think the dictation, copying, and mailing are to be treated as only one act of the corporation; and, as the two servants were required to participate in it, there was no publication of the letter, in the sense in which that term is understood, by delivery to and reading by a third person. There was in fact but one act by the corporation, and those engaged in the performance of it are not to be regarded as third parties, but as common servants engaged in the act."

In *Gambrill v. Schooley,* 93 Md. 48, 48 Atl. 730, 86 Am. St. 414, 52 L. R. A. 87, the case is commented upon and the doctrine disapproved. The precise question, however, was not before the court; the question there being whether the dictation of a libelous letter by an individual defendant to a stenographer in his employ was a publication of the letter by the person who dic-

tated it. If the court adheres to this doctrine when the question is squarely before it, seemingly it must also hold that the very act of writing the letter is a publication, since the writer, of necessity, must act as the agent of the corporation, and clearly he is no more or no less an agent of the corporation than is a stenographer employed by it. The powers of certain officers and agents of a corporation with reference to its business, it is true, may be more extended than are the powers of others; but when each acts in his line of duty to the common employer, plainly the acts of the one are to be accorded the same legal effect as the acts of the other.

The cases cited from this court we need not review. None of them touch upon the question here for determination, much less do they require a contrary conclusion.

The judgment is affirmed.

HOLCOMB, MAIN, MOUNT, and PARKER, JJ., concur.

[No. 15111. Department Two. May 28, 1919.]

LAMB-DAVIS LUMBER COMPANY, *Appellant*, v. E. F. STOWELL, *Administrator etc., Respondent.*

J. A. PRENTIS, *Appellant*, v. E. F. STOWELL, *Administrator etc., Respondent.*

CASHMERE MERCANTILE COMPANY, *Appellant*, v. E. F. STOWELL, *Administrator etc., Respondent.*[1]

APPEAL (275, 317)—RECORD—STATEMENT OF FACTS—CERTIFICATE AS TO MATERIAL FACTS—EFFECT OF STIPULATIONS. The evidence must be brought up by bill of exceptions or statement of facts, certified by the judge to contain all the material facts, and a stipulation of counsel that it contains all the material facts cannot supplement or be substituted for an insufficient certificate.

EXECUTORS AND ADMINISTRATORS (42-1, 45)—CONTRACTS—SALE TO ADMINISTRATOR IN INDIVIDUAL CAPACITY. An administrator *de bonis non* is not liable for apple boxes and goods, alleged to have been purchased by a former administrator and used in marketing crops, where they were sold to him upon his individual credit, and not as administrator, and no claim therefor was filed against the estate.

Appeal from judgments of the superior court for Chelan county, Grimshaw, J., entered December 13, 1917, upon findings in favor of the defendant, dismissing consolidated actions to establish claims against an estate. Affirmed.

W. F. Whitney, for appellants.

Charles F. Wallace and *Sam R. Sumner*, for respondent.

FULLERTON, J. — In these actions, which were consolidated for the purposes of trial in the court below and for the purposes of this appeal, the appellants sought to recover from the administrator *de bonis non* of the estate of Maude E. French, deceased, for certain articles of merchandise sold by them severally to

[1]Reported in 181 Pac. 520.

the former administrator of the estate, which were alleged to be necessary expenses incurred by the then administrator in the conduct and management of the estate. The first of the causes of action was before this court on the question of the sufficiency of the complaint in *Lamb-Davis Lumber Co. v. Stowell,* 96 Wash. 46, 164 Pac. 593, L. R. A. 1917 E 966. On that appeal we held the complaint sufficient, reversing and remanding the cause for further proceedings. After the remand of that cause, the other actions were commenced. The administrator *de bonis non* answered the complaints, putting in issue their principal allegations and setting up affirmative defenses thereto. The trial court made findings sustaining the administrator's contentions and entered judgments accordingly. It is from these judgments that the present appeal is prosecuted.

The appellants present the appeal in this court as if the cause were before us for trial *de novo.* We find, however, from an examination of the record, that the purported statement of facts does not contain all of the evidence submitted to the trial court, and is not certified by the judge of the trial court in any manner whatsoever. When this condition of the record was called to the attention of the appellants' counsel, he answered by submitting a stipulation, signed by himself and the opposing counsel, reciting in effect that the purported statement does contain all of the material facts and that the same may be treated and considered by this court as if duly settled and certified by the trial judge. But it is at once apparent that the stipulation cannot be given effect. This court has jurisdiction to review a judgment upon the evidence only when the evidence is brought before it in the manner provided by statute. *Howard v. Ross,* 3 Wash.

292, 28 Pac. 526; *Madigan v. West Coast Fire & M. Ins. Co.*, 3 Wash. 454, 28 Pac. 1027; *Ward v. Tucker*, 7 Wash. 399, 35 Pac. 126, 1086; *Oliver v. Lewis*, 9 Wash. 572, 38 Pac. 139; *Scott v. Bourn*, 13 Wash. 471, 43 Pac. 372; *Adams v. Columbia Canal Co.*, 51 Wash. 297, 98 Pac. 741.

The only method provided by statute for bringing the evidence into this court is by a statement of facts or bill of exceptions certified to by the judge of the trial court. Stipulations of counsel are not methods so provided, and hence cannot be recognized by the court.

It is, of course, open to the appellants to contend that the findings of fact made by the trial court require a judgment different from that entered by the court. But aside from the fact that the appellants seem not to seriously contend that the findings do not support the judgments, a perusal of the findings, it seems to us, leaves no doubt upon the question.

The first of the causes of action was for the purchase price of apple boxes sold to one J. H. French, who was then administrator of the estate. But while the court found that the boxes were purchased and used by French in marketing the apple crop growing upon premises belonging to the estate in the year 1914, it further found that they were sold upon the individual credit of French, not in his capacity as administrator of the estate, and at a time when his powers as such administrator were suspended by an order entered of record in the superior court. It further found that the proceeds of the apple crop were taken by French and credited to his individual account, and that, on the settlement of his account with the estate, he was duly credited with all sums of money coming to him from the estate. It may be that, if French now had a claim

against the estate for the purchase price of these boxes, the court would allow the vendor, since he has not been paid, although he dealt with French personally and not as administrator, to be subrogated to the claims of French. But since French has no such claim, there is no room for subrogation, and the vendor must be relegated to the individual liability of French. Plainly, the vendor has no valid claim against the estate.

With reference to the second cause of action, the court also found that the claim was for goods and merchandise sold to French individually and not in his capacity as administrator of the estate, and found that French had been allowed for all moneys due him in his settlement with the estate. It further found that, as a claim against the estate, the account was barred by the statute of limitations. We think that here also there is no basis for a recovery against the present administrator.

The findings concerning the other cause of action are substantially the same as the second and, in our view of their effect, amply support the judgment entered thereon.

It is unnecessary to pursue the inquiry further. The judgments are sustained by the findings and must stand affirmed.

It is so ordered.

CHADWICK, C. J., MOUNT, PARKER, and HOLCOMB, JJ., concur.

[No. 15125. Department One. May 28, 1919.]

LOUISE DELBOSCO, *as Guardian etc., Appellant,* v. NORTHERN PACIFIC RAILWAY COMPANY, *Respondent.*[1]

RAILROADS (53) — INJURY TO TRESPASSING BOY ON CARS — NEGLIGENCE. It is not negligence for a railroad company to fail to detect a trespassing boy boarding a car in an unfenced switch yard frequented by children, where his presence was not known to the train crew and efforts had been made by way of warning and arrests to deter this form of trespass.

SAME (56)—INJURIES TO TRESPASSERS—ISSUES, PROOF AND VARIANCE. Under a complaint for injuries, sustained by a boy of nine trespassing by boarding a train in an unfenced switch yard, alleging negligence in failing to warn or object to children on its right of way and in starting the train after seeing the boy take hold of a car to board it, it is error to admit evidence of the violation of a city ordinance requiring the defendant to fence its yards.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered May 11, 1918, upon granting a nonsuit, dismissing an action for personal injuries sustained by a minor in boarding a freight train. Affirmed.

Pruyn & Hoeffler and *Grinstead & Laube,* for appellant.

C. H. Winders, for respondent.

MACKINTOSH, J. — The main line of the Northern Pacific Railway passes in a general easterly and westerly direction through the corporate limits of the city of Cle Elum, in this state; the company also maintains yards within the same corporate limits, approximately one and one-half miles in length. For a space of practically a mile, there is a large amount of trackage paralleling the main track—sixteen par-

[1]Reported in 181 Pac. 683.

allel tracks, to be exact. These tracks are numbered, the two northernmost tracks being numbers fifteen and sixteen. In this entire area, there is but one public crossing. Contiguous to the yard trackage are dwellings and a schoolhouse, and adjacent to certain parts thereof is dense undergrowth. It appears that the public have for years crossed the tracks at any point suited to individual convenience, there being no fence or other obstruction to such passage. Paths had been worn leading to the railway grade, but there were no defined paths across the grade and the tracks themselves.

On June 23, 1917, in the afternoon, John Lievore, a boy nine years of age, came upon a path from the north of the tracks, with a companion of about the same age, while cars to which an engine was attached were standing on track number fifteen. He walked along track sixteen for a short distance, and then leaving his companion, crossed to track fifteen and proceeded to get upon one of the cars there standing, grasping the handirons on the side of the car, and was attempting to place his feet in the iron stirrup, when the train started. The jerk threw him from the car, whereby he sustained injuries, the subject of this suit.

At the trial in the superior court for King county, the appellant predicated his case upon the theory that, conceding the boy to be a trespasser, nevertheless the company was so negligent as to render it liable in damages. The negligence consisted, it was there urged, and is here argued, of two phases: first, that the trainmen in charge of the train from which the boy was thrown were not, or should not have been, ignorant of the boy's attempt to board the car; and second, the failure of the company to maintain a fence on that portion of its right of way. To this the respondent replies that it was not the duty of the train-

men, in these circumstances, to keep watch for trespassing children, and that the absence of a fence upon the right of way was at the order of the city authorities of Cle Elum, averring that it is, and has always been, ready and willing to erect an adequate fence thereon.

There is considerable evidence in the record as to the trespassing of children on the company's tracks. It will be conceded that the gist of this evidence is that it was well known to the authorities of the city of Cle Elum and of the railroad company, and that efforts were made from time to time, by way of warning and some arrests, to deter this form of trespassing. The appellant contends that this situation presented a question as to how much the duty of a railroad crew towards trespassing children was qualified by such situation, arguing that it placed upon the crews the burden of determining, before starting their trains, whether or not any children were boarding them or had boarded them. There is no testimony that the crew saw the boy, the obligation sought to be enjoined upon the respondent being that its crew should have seen him. In other words, there was no wanton injury. The company was not obliged to employ men to keep boys from trying to ride on the cars:

"As wide a range as the decisions of courts have taken on this interesting subject, no court, to my knowledge, has gone so far as to hold that railroad companies are the absolute insurers of the life and limbs of boys who, against their express commands, insist upon trespassing upon their property; and to sustain this case would, in my opinion, go that far. The only way the company could prevent this would be to keep a sufficient number of guards to detect boys in their attempts to board the cars or engines. If the presence of the boy on the engine or cars had been brought to the knowledge of the operators of the en-

gine, it is plain that their duty would have been to have protected him from harm, no matter how great his negligence might have been. The testimony shows that they did not see the boy on the engine, and did not know that he was there; for, by reason of his location on the foot-board of the engine, the engineer, in the performance of his ordinary duties, could not have seen him." *Oregon R. & Nav. Co. v. Egley,* 2 Wash. 409, 26 Pac. 973, 26 Am. St. 860.

See, also, *Clark v. Northern Pac. R. Co.,* 29 Wash. 139, 69 Pac. 636, 59 L. R. A. 508; *Johnson v. Great Northern R. Co.,* 49 Wash. 98, 94 Pac. 895; *Kroeger v. Grays Harbor Construction Co.,* 83 Wash. 68, 145 Pac. 63; *Shafer v. Tacoma Eastern R. Co.,* 91 Wash. 164, 157 Pac. 485, L. R. A. 1916F 114; 2 Thompson, Negligence, § 1825; 2 White, Personal Injury on Railroads, § 1102. The crew was performing its duty and in proper positions where its members could not see the boy coming upon the right of way, and had, therefore, no opportunity to anticipate that he was about to attempt to climb onto the cars. The train was being properly handled, and the respondent cannot be held to the duty of operating it for the convenience of the boy, who was there only for the purpose of trespassing upon the cars. On this phase of the case, the respondent was clearly not liable.

In 1906, the city of Cle Elum passed an ordinance providing for the fencing by the respondent of its right of way, and the appellant calls attention to the general rule that the violation of such an ordinance is in itself negligence. Without passing upon the question presented by the respondent's evidence tending to show that the operation of the ordinance had been suspended at the order of the city, we are of the opinion that the receiving of the ordinance in evidence and permitting the introduction of testimony in regard to the nonfencing of the right of way was erroneous.

Where facts constituting the alleged negligence are specifically set forth in the complaint, it is error to allow on the trial evidence of other acts of negligence, when the admission of such evidence has been properly objected to. The complaint in this case charged the railroad company with failing to warn or object to children playing and loitering upon its right of way, and that the employees of the company, seeing the boy standing on the siding track, and seeing him take hold of the car for the purpose of boarding it, started the train suddenly without notice. These grounds of negligence, as alleged, do not present the question of the fencing of the right of way, and lay no foundation for the introduction of evidence of the ordinance providing for the fencing. The necessity of alleging the grounds upon which recovery is to be obtained is well illustrated in this case; the action was tried in a county different from that in which is the city whose ordinance is in question, and presents an issue which, on that account, was difficult to meet, and which might have been met had notice been given the opposing party of the tender of the issue by its being pleaded in the complaint. In this case, the record shows that there was a serious question whether the ordinance was in effect at the time of the injury. In view of those facts, it was certainly prejudicial to the respondent to have introduced, over its objection, issues which were not pleaded.

There being no evidence in the case sufficient to go to the jury upon the first question discussed, and the evidence in regard to the fencing of the track having been improperly admitted, the appellant was not entitled to recover, and the judgment of the lower court will be affirmed.

CHADWICK, C. J., MITCHELL, MAIN, and TOLMAN, JJ., concur.

[No. 15155. Department Two. May 28, 1919.]

W. S. WALTERS, *Respondent,* v. NICK SIEVERS *et al., Appellants.*[1]

TRIAL (134, 143)—VERDICT—CONSTRUCTION AND OPERATION. In an action for personal injuries received when an employee, pursuant to a command, removed a halter from a vicious cow, a general verdict for plaintiff, together with a special finding that he was injured as he claims, amounts to a finding that he removed the halter pursuant to orders.

MASTER AND SERVANT (102, 161) — RISKS ASSUMED — COMPLIANCE WITH COMMANDS. Whether a farm hand, employed to milk and care for cows, assumed the risks in removing a halter from a cow known by him to be vicious, is a question for the jury, where there was evidence that he did so under protest in the presence and at the command of the employer; the question being whether he acted as a reasonably prudent person.

CHADWICK, C. J., and MOUNT, J., dissent.

Appeal from a judgment of the superior court for Adams county, Truax, J., entered October 4, 1918, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Affirmed.

Adams & Naef, for appellants.

G. E. Lovell, for respondent.

FULLERTON, J.—The respondent brought this action against the appellants to recover in damages for personal injuries received from a bunt of a "muley" or dehorned cow.

The evidence, over which there is no dispute, discloses that the appellants are farmers, engaged in conducting a large farm on which they keep the domestic animals usual in such cases. The respondent was employed by the appellants to care for the animals, a part of his duty being to milk the cows. The

[1]Reported in 181 Pac. 853.

cow causing the injury was one of those he was required to milk. This cow had become fresh about a month before the injury, and was kept in a stall in a stable, to the manger of which stall she was fastened with a halter and chain. From the time of becoming fresh to the time of the injury, the cow was not turned out of the stall, but was fed and watered while therein by the respondent. She had a propensity to kick when being milked, and to prevent or check this, the respondent fastened a strap around her body immediately in front of her udder. The strap was not removed from the cow between milking times, and the evidence is silent as to whether it was even loosened between these intervals.

The evidence concerning the transactions at the time of the injury is widely divergent. The respondent testified that, on the evening of the injury, after the cow had been milked, he returned to the stable and found the cow bellowing and pawing and striking with her front feet; that he called to one of the appellants, who came into the stable and looked at the cow; that the appellant, after looking at her for a moment, told him to remove the halter and turn her loose and not try to milk her any longer; that he objected to going into the stall while the cow was in her enraged condition, but was assured by the appellant that she would not harm him; that he went into the stall on receiving that assurance, and was attempting to remove the halter when the cow lunged at him, catching his leg between her head and the manger and causing the injury for which he sues. He further testified that the cow was vicious and dangerous, and that he had, at various times, protested to the appellants against milking her because of her disposition, but was told each time to milk her a little longer, when she would be turned out to pasture.

The particular appellant to whom the respondent referred testified that he was called into the stable for an entirely different purpose than that stated by the respondent; that another cow, which had recently calved, was in the stable, whose udder was so swollen and sore that she would not nurse her calf, and that he was called in to advise some form of relief for her. He further testified that the cow of which the respondent complains was quiet when he entered the stable; that he entered her stall for the purpose of removing the strap from her body, intending to use it on the other cow; that the cow turned her heels towards him, causing him to "jump back," when the respondent told him to stay out of the stall, as he was like a stranger there, and proceeded to remove the strap himself, when he was bunted, as he testified. He denied that the cow was vicious or dangerous, or that the respondent had ever complained to him that she was so. Others of the appellants also testified to the disposition of the cow, stating that she was neither vicious nor dangerous, and that no complaints had been made to them by the respondent concerning her disposition.

The jury returned a general verdict, finding in favor of the respondent in the sum of $181. They also returned the following special verdict:

"We, the jury, duly empanelled and sworn to try and determine the special questions of fact in the above-entitled cause submitted to us, and to render a special verdict therein, do find, in answer to the special interrogatories submitted to us, as follows, to-wit:—

"INTERROGATORY 1:—Was the cow in question vicious or dangerous? And, if so, did Nick Sievers or any of the defendants know that fact? (Answer fully)

"ANSWER:—Yes.

"INTERROGATORY 2:—Did the plaintiff remove a strap from the cow in question? And, if so, was he com-

manded or directed to do so by one of the defendants, or did he do so voluntarily, of his own free will and accord? (Answer fully)

"ANSWER:—No. No; he was not commanded to do so.

"INTERROGATORY 3:—Was plaintiff injured as he claims? And, if so, do you find that he is entitled to recover in this action?

"ANSWER:—Yes.

"If so, how much is he entitled to recover on account of expenses for medical attendance, if anything?

"ANSWER:—$31.

"If so, how much, if anything, is he entitled to recover on account of loss of earnings?

"ANSWER:—3 months salary at 50 per month, $150.

"If so, how much should he recover, if anything, because of pain and physical suffering?

"ANSWER:—None.

"If so, has plaintiff suffered injuries of a permanent character? And how much, if anything, do you award him on this ground?

"ANSWER:—None.

"Dated this 20 day of June, 1918.

"J. C. Koch, Foreman."

At the close of the respondent's case in chief, the appellants moved for a dismissal of his action on the ground of insufficiency of the evidence, and after the return of the verdict and before judgment was entered thereon, moved for judgment notwithstanding the verdicts, and, in the alternative, for a new trial. These motions the trial court overruled, and the assignments of error on this appeal are based on the rulings of the court denying the motions.

In this court the appellants do not argue their assignments of error separately. It is contended, or, if not contended, assumed, that the answer of the jury to the second interrogatory negatives the respondent's contention that he was directed by the appellant, whom

he called to the stable at the time of the injury, to remove the halter from the cow and turn her loose, and argue that this finding, taken with the respondent's testimony to the effect that he knew the cow was vicious and dangerous, precludes a recovery by him. If the contention with reference to the answer has foundation in fact, there is much force in the argument. It is the general rule, undoubtedly, although perhaps not sustained by all of the cases, that one employed by an owner to care for a vicious and dangerous animal which he knows to be such, cannot recover from the owner for an injury received while in the exercise of such care, even though the animal be of a species that is domestic and ordinarily docile. But we cannot thus interpret the jury's findings. It will be remembered that the witnesses were widely divergent as to the occurrences at the time of the injury. Both the appellant and the respondent testify that the cow had a halter on her head, with which she was tied to the manger, and that she had a strap around her body, placed thereon to prevent kicking while she was being milked. The respondent's version of the transaction was that he was directed to remove the halter from the cow's head and turn her loose, and emphatically denied that he was directed to remove the strap which was around her body. The appellant witness' version was that the removal of the strap from around the cow's body was the object sought to be accomplished, and that nothing was said about removing, and no attempt was made to remove, the halter. An inspection of the interrogatory will disclose that the jury were asked concerning the removal of the strap, not the removal of the halter, and that their answer is plainly in accord with the evidence concerning the strap. They were not required to nor

did they answer specially with reference to the fact whether the respondent was directed to remove the halter.

The jury, therefore, found with the respondent's version of the transaction; that is, they found that the respondent was directed to remove the halter, not the strap, and that he was directed so to do by the appellant, whom he called into the stable. This they did, not only by their general verdict in favor of the respondent, but also by their special verdict in answer to the third interrogatory, where they found that the respondent was "injured as he claims" and "is entitled to recover in this action."

The question for determination, as we view it, then is, Can an employee, employed by an owner to care for an animal known by the employee to be vicious and dangerous, recover for an injury received by him while performing an act in the care of such animal which is performed under the immediate supervision and direction of the owner? The answer to this question, it is clear, must depend upon the facts of the particular case. A servant cannot recover from the master for an injury received in the performance of an act, although directed by the master, if the act directed be one which no reasonably prudent person, having regard for his own safety, would undertake; or, to state the proposition in another way, where the dangers of performance are so apparent that there can be no room for two opinions concerning it. On the other hand, a servant may recover for an injury received in the performance of an act directed by the master, even if the servant has some knowledge of the dangers of performance, if he acts with that degree of prudence which an ordinarily prudent man would exercise under the circumstances. This latter

rule is founded on plain principles of justice. The master and servant are not altogether upon an equal footing. It is the right of the master to direct his servant, and the primary duty of the servant is to obey. The master ordinarily has superior knowledge of the facts and conditions, and the servant has a right to assume that the master will not expose him to unnecessary perils. Hence, if there is room for two opinions concerning the dangers of the particular act directed, it is for the jury to say whether the servant acted with that degree of prudence which will permit a recovery when injury ensues, or whether the act was such that no reasonably prudent person would undertake it, regardless of the assurances that were given him.

In the present instance, we think the question of the appellants' liability was properly submitted to the jury. The animal the respondent was employed to tend was not one belonging to a species wild and ferocious by nature; one which it could reasonably be supposed he was employed to care for because of his expert knowledge or special fitness for the purpose. On the contrary, the animal was an ordinary domestic animal of a species usually mild and docile. While he had learned in the course of his employment that the particular animal was not of that docile character usual in animals of this class, yet he had milked and otherwise tended her for some weeks without being injured by her, and we think it too much to say that, as a matter of law, he assumed the risk of injury when, in obedience to the direction of the owner, he undertook to remove the halter with which she was tied at the time in question.

The judgment is affirmed.

HOLCOMB and PARKER, JJ., concur.

MOUNT, J. (dissenting)—The character and disposition of the animal was apparent, and for that reason the respondent assumed the risk. I therefore dissent.

CHADWICK, C. J., concurs with MOUNT, J.

[No. 15254. Department Two. May 28, 1919.]

THE STATE OF WASHINGTON, *on the Relation of John P. Carlson et al., Plaintiff*, v. THE SUPERIOR COURT FOR KITSAP COUNTY, *Walter M. French, Judge, Defendant.*[1]

EMINENT DOMAIN (15, 39)—PRIVATE WAY OF NECESSITY—EVIDENCE—SUFFICIENCY. Under Rem. Code, § 5857-1, giving the right to condemn a private way of necessity where it is necessary for the proper use and enjoyment of premises, the burden on the petitioner to show a reasonable necessity is not satisfied by proof that the way sought is his most practicable way of egress and ingress, where he had a present right of way by grant over other premises which much of the testimony showed was capable of being made passable at some inconvenience and added expense, yet within bounds; the statute not being favored in law and the rule of necessity more strict between private owners than for public service companies.

EASEMENTS (13)—WAY OF NECESSITY. On the sale of part of a tract, cut off from access, an easement or right of way by necessity over the grantor's other land is implied.

Certiorari to review a judgment of the superior court for Kitsap county, French, J., entered February 18, 1919, upon findings in favor of the petitioner, in proceedings to condemn a private way of necessity, after a hearing before the court. Reversed.

Geo. H. Rummens and *Walter Schaffner*, for plaintiff.

Bryan & Garland, for defendant.

[1]Reported in 181 Pac. 689.

CHADWICK, C. J.—C. H. Davis, whom we shall refer to as the petitioner, brought a proceeding in the court below to condemn a private way of necessity over and across the lands of the relators. Some seven years ago, Davis bought a tract of ten acres from his father, D. J. Davis. The tract was land-locked. A county road ran along the north boundary of the D. J. Davis land and along the west boundary of the land of the relators. Petitioner has improved his land, and for the seven years of his ownership has maintained a way over the lands of his father. Conceiving the way over his father's land to be less convenient and less practicable, as it is a little longer and more circuitous than a way over relators' land would be, petitioner brought a proceeding to condemn a private way of necessity along the north line of relators' property. After a full hearing and a view by the court, an order of necessity was made, and the court proceeded forthwith to call a jury and took an assessment of damages.

The testimony is, in a sense, conflicting; but when measured by the history of the case and the privileges and demands of the statute, we find no difficulty in reaching a conclusion. We shall refer briefly to the testimony of the witnesses:

D. J. Davis, petitioner's grantor, testified that the only feasible or practical way for C. H. Davis to get out from his property to a public road is over the Carlson property; that to go any other way it would cost more to build a road than the Davis tract is worth. C. H. Davis, the petitioner, testified that there was no other practicable or feasible way for him to get from his land to a public road; that the present trail over his father's tract was, during the greater part of the year, impassable and could not be made passable; that children could not go to school over it, and

that merchants had refused to deliver goods to his family unless a road was established. Other witnesses testified that the road was impassable for the greater part of the year as it now exists; that the way was over high and difficult hills and low boggy ground. Others testified that there was no reasonable way out of the tract unless it be over the Carlson land.

Relator testified that as good a grade could be made across the Davis land as across his land, and for an equal amount of money; that he could, at a reasonable cost, build a good road across the D. J. Davis land at a grade not exceeding five per cent at any place; that it would be necessary to make a steep grade down a hill and a bridge at least one hundred feet long to go over his land; that he has cleared and seeded to grass the boggy ground on the north line of his place; that a road over it would have to be filled or planked so as to make a passable roadway in the wintertime; that he had worked for a road contractor for several years and knew the cost of road construction, and that a road could be built as cheaply and conveniently over the one way as the other. He further testified that he had dammed the creek and excavated a large fish pond on the line of the proposed way at a cost of over three hundred dollars, and that the establishment of a way of necessity would ruin it.

A. P. McDonald testified that he had eighteen years' experience in road building, had worked for lumbering companies, laid out roads for them, and knew in a general way all that anybody does in regard to laying out roads. He further testified:

"I was one of the viewers appointed by the court in the first case brought by the plaintiff against the Carlsons, which case was dismissed. I looked over this matter very carefully, and came to the conclusion that I could not determine whether it would be more feas-

ible to build a road across the D. J. Davis land or across the Carlson land. I could not do this unless I made an accurate survey of it, and I was not employed to do that. I came to the conclusion, as best I could without an actual survey, that it was about an even break between the two,—that is, one road would be about as good as the other, and would cost about as much. It is not possible for anybody to tell accurately about one of these roads without a survey. There would be some grading to do on both roads. There would be more grading on the Davis land than on the Carlson, but there would not be as many fills or as long a bridge on the Davis land."

A brother of relator testified that there would be no material difference in cost; that a road over the Davis land would be better because it would not have a steep grade on it; that there would be a very steep grade to go from the petitioner's land to the relators' land; that the grade would land on a bridge, and that a road fifteen feet wide could not be built without making a deep cut away back on the petitioner's land.

Mr. Anderson, county assessor, testified that, in order to get off the Davis land onto the Carlson land, a bridge at least sixty feet long would have to be built. In rebuttal, D. J. Davis testified that, if a road was put over his land, it would require a bridge forty or fifty feet long.

It is argued that the way over the Davis land is impassable and impractical, and out of these things a necessity arises.

The court found that the establishment of a private way of necessity over relators' land was necessary and that the petitioner had no means of ingress or egress from his premises, and that the most practical route for the roadway was over and upon the land of the relators. From these findings the court concluded that there was a necessity for the establishment of a road-

way from the lands of the petitioner, and that the most practicable route for said road is along the north line of relators' property. We are called upon to review the order of necessity.

When D. J. Davis sold a part of his land to the petitioner, an easement or way of necessity was implied in the grant. This was the rule of the common law. It has been followed almost, if not quite, universally in other states and has never been questioned in this state. *Schulenbarger v. Johnstone,* 64 Wash. 202, 116 Pac. 843, 35 L. R. A. (N. S.) 941, and cases there cited. So that the question of law is whether one, having a legal right to pass over the lands of his grantor, may reject the way that the law gives him and which his grantor cannot deny him, and compel a way of necessity over the lands of a stranger, where, upon a mere admeasurement of convenience and expense, it is held that the way over the land of the stranger is the more practicable than the way over the land of the grantor.

At common law, and with us, there is no such thing as a way of necessity over the lands of a stranger, for a way of necessity arises out of contract and is grounded in the doctrine of estoppel. *Schulenbarger v. Johnstone, supra.* So it may be said that, notwithstanding a statute gives a land-locked owner the right to condemn a way of necessity over the lands of a stranger, it is not a favored statute, and the taking will not be tolerated unless the necessity is paramount in the sense that there is no other way out or that the cost is prohibitive, for it must be borne in mind that, after all, this is a condemnation proceeding. We are taking the property of one man and giving it to another. Const., art. 1, § 16. There is a constitutional right involved, and such rights should not be so lightly regarded that they may be swept away to serve convenience and advantage merely.

The statute provides:

"An owner . . . of land which is so situate with respect to the land of another, that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity . . . on, across, over or through the land of such other, for agricultural, domestic, or sanitary purposes, may condemn and take lands of such other sufficient in area for the construction and maintenance of such private way of necessity." Laws 1913, p. 412, § 1 (Rem. Code, § 5857-1).

The burden of proof is on the petitioner to show a reasonable necessity. We are of opinion that the petitioner did not maintain this burden; and further, that the legal conclusion of necessity does not follow a finding that the way over relators' lands was the most practicable way of egress and ingress from and to the petitioner's lands.

The testimony shows no more than this: That the way over the grantor's land would be over a hill that must be graded, over a small stream that must be bridged, and boggy ground that must be planked or filled; that, to go over relators' land, a deep cut would have to be made in the hill or bench ground to allow the road to descend to the low ground; that a stream—probably the same stream—would have to be bridged; that the boggy ground would have to be planked or filled. While it may be said that neither way is practical and convenient as it is, it does not follow that either way may not be made so. There is a difference between necessity and mere convenience. A man having a present right of way may find a more convenient way over the land of another, but he may not take it under a claim that it is necessary to the proper use and enjoyment of his land or to save expense, unless there is no other passable way or the expense would be prohibitive. It is true that Davis, the grantor, has

testified that a road over his land would cost more than the petitioner's land is worth, but he is not borne out by the history of the case.

On this phase of the case we are most impressed with and, as against the testimony of interested witnesses, are inclined to follow, the testimony of the witness McDonald. That he is a man of standing and judgment we infer from the fact that he was one of the commissioners appointed by the court upon a previous hearing of this same matter. The only difference that we can measure is that, of the two routes, the one over the Davis land would be longer, slightly circuitous, and would possibly cost more to improve, while the way over the land of the relators would be shorter and follow a straight line.

We give no heed to the testimony that the way over the Davis land is impassable, for it is plain that the witnesses had in mind the winter season and the present condition of the land. The same may be said of the relators' land. Both ways are impassable and impracticable in the winter season without improvement, and when petitioner bought his land with the implied right to go and come over the land of his grantor, he took upon himself the burden of improving the way, and that burden will not be measured by relative cost. To illustrate: Say an owner had cleared his land out of the big timber and had seeded it to grass or crops, and an adjoining owner of uncleared land had sold a tract within his own enclosure to a stranger, could it be said that the land-locked owner, having an implied way of necessity over his grantor's land, could condemn a way over the cleared land of the stranger because it was more convenient and would be less expensive than it would be to cut down the trees and grub out the stumps on his grantor's land?

The general subject of necessity is treated in 21 R. C. L., p. 1214 *et seq.* While the text and the cases there cited deal generally with ways of necessity in the strict sense, as distinguished from the condemnation of a private way of necessity, we apprehend that the same rule would apply, for, assuredly, a greater interest could not be condemned than would arise under the implications of a grant. It will be noticed that there is a division of authority, some cases holding that the necessity requisite to create a right of way (or, as we may say, to give a right of condemnation) must be absolute and indispensable, and others that no more is required than a showing of reasonable necessity; that it is sufficient if it be shown that no other way can be made without unreasonable labor and expense, and that the reasonableness of the labor and expense is determined by the cost of creating the way as compared with the value of the property. But however this may be, it is said that mere inconvenience, no matter how great, will not sustain the right to insist upon a way of necessity. In this state we have perhaps adopted the rule of reasonable necessity. *Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586, 73 Pac. 670; *State ex rel. Mountain Timber Co. v. Superior Court*, 77 Wash. 585, 137 Pac. 994; *State ex rel. Washington Boom Co. v. Chehalis Boom Co.*, 82 Wash. 509, 144 Pac. 719.

In the *Samish River Boom Co.* case, *supra*, it is said:

"But the word 'necessity,' as used in the statute, 'does not mean an absolute and unconditional necessity, as determined by physical causes, but a reasonable necessity, under the circumstances of the particular case, dependent upon the practicability of another route (here another location), considered in connection with the relative cost to one, and probable injury to the other.' "

The word "necessity" cannot be defined in such a way as to meet every case; its meaning must be found in the facts and circumstances disclosed in the instant case, and while the words used by the court in the *Samish River Boom Co.* case might seem to apply to the case at bar, considering the facts in this case and the facts in the cases cited, we are not inclined to follow them without qualification. In this case, as we have shown, it is a mere matter of inconvenience and added expense, but yet within bounds, to an individual owner. In the cases cited, it was a necessity arising out of the needs of a public service corporation, where either the line of a railroad over a general route or the windings and physical features of a stream were to be considered.

But certain it is that the rule should be more strict between private owners, who are strangers in title, than between public service corporations, who are in law representing a necessity common to the whole public. In law, the land of D. J. Davis is the land of the petitioner. A way of necessity

"never exists where a man can get to his property through his own land. That a road through his neighbours would be a better road, more convenient, or less expensive, is not to the purpose; . . . It is only where there is no way through his own land, that right of way over the land of another can exist." *McDonald v. Lindall,* 3 Rawle (Pa.) 492.

See, also, *Hyde v. Jamaica,* 27 Vt. 443; *Alley v. Carleton,* 29 Tex. 74, 94 Am. Dec. 260; *Carey v. Rae,* 58 Cal. 159.

A few of the states have constitutional provisions with reference to the taking of ways of necessity in eminent domain similar to our own; Georgia is one of these. In *Gaines v. Lunsford,* 120 Ga. 370, 47 S. E. 967, 102 Am. St. 109, it was shown that the plaintiff's farm

was touched by two "settlement" roads, and that he could have reached either over his own land without crossing the plantation of Gaines. It was claimed, however, that a farm road from plaintiff's dwelling would have to cut across a deep cut or obstruction in his field; that it would have been expensive to have constructed the route over the same, and that a way thus laid out would lead to "settlement" roads which were steep, hilly, and in such bad condition that it was impossible to haul more than half a load. The court held that the constitution provides for ways of necessity, but not for those of convenience, and upon the authority of *Chattanooga R. & S. R. Co. v. Philpot,* 112 Ga. 153, 37 S. E. 181, that:

"If there is a way by which the applicant can lawfully reach his farm or place of residence, a case of necessity does not exist,"

and that, if the land could be reached, although by a distant or difficult road, the one claiming a way of necessity is not entitled thereto.

The principle is well stated in *Lawton v. Rivers,* 2 McCord (S. C. Law Rep.) 445, 13 Am. Dec. 741:

"But there must be an actual necessity, and not a mere inconvenience, to entitle a person to such right. One man is not required to subject himself to an inconvenience, and much less to an actual loss, for the accommodation of another. I do not mean to say that there must be an absolute and irresistible necessity; an inconvenience may be so great as to amount to that kind of a necessity which the law requires, and it is difficult, and perhaps impossible, to lay down with exact precision the degree of inconvenience which will be required to constitute a legal necessity. It is apparent, however, that no such necessity existed in this case. The plaintiff has a navigable water-course from his door to the public road or highway, by which the distance is not greater than by land; and although

there may be some inconvenience in being obliged always to go by water when he visits his plantation, yet it is not greater than necessarily attends every insular situation, and perhaps not so great to him as it would be to his neighbor, to keep up a lane through his plantation for his accommodation; and even if it was greater, it was one of which he was aware when he purchased (or those under whom he claimed), and may, therefore, be considered of his own creation."

We hold that petitioner has not maintained the burden of proof, and that, although the finding of the court be sustained that the way over relators' land is more practicable than a way over the land of petitioner's grantor would be, this in itself is insufficient to sustain a legal conclusion of necessity.

Reversed.

MITCHELL, TOLMAN, and MOUNT, JJ., concur.

[No. 15281. Department One. May 28, 1919.]

THE STATE OF WASHINGTON, *on the Relation of Arthur Best, Plaintiff*, v. THE SUPERIOR COURT FOR OKANOGAN COUNTY, *Respondent*.[1]

INDIANS (16, 17)—CRIMINAL PROSECUTIONS—JURISDICTION OF STATE COURTS. The state courts have jurisdiction to try for larceny, committed without the limits of allotted land, a tribal Indian of the quarter-blood who, under the Dawes act (3 Fed. Stat. Ann. 821), was a ward of the government and an allottee of lands in an Indian reservation which had been opened and restored to the public domain, subject to the reservations and allotments; since the reservation was no longer an Indian reservation and Congress has not attempted to enact criminal statutes dealing with acts committed by Indians outside the territorial jurisdiction of the United States.

Application filed in the supreme court March 17, 1919, for a writ of prohibition to prohibit the superior

[1]Reported in 181 Pac. 688.

court for Okanogan county, Neal, J., from trying the relator upon a charge of grand larceny. Denied.

P. D. Smith, for relator.

W. C. Gresham, for respondent.

TOLMAN, J.—This is an original application for a writ of prohibition to be directed to the superior court for Okanogan county, prohibiting and restraining that court from proceeding to try the relator upon two separate charges of grand larceny, as presented by information filed by the prosecuting attorney of that county.

Relator is an Indian of the quarter-blood, a member of the Colville tribe of Indians, and has never severed his tribal relations. He was allotted a tract of land by the United States government in 1914, upon the south half of the diminished Colville Indian reservation, in Okanogan county, and has ever since held and occupied the same; but the title thereto is held in trust for him by the United States government, and will continue to be so held until the expiration of the trust period of twenty-five years. It is alleged that the crimes with which the relator is charged were committed, if committed at all, within the limits of the south half of the diminished Colville Indian reservation; but it is not claimed that they, or either of them, were committed upon allotted land or lands within the exclusive jurisdiction of the United States. The sole question here presented is whether or not the state courts have jurisdiction to try an Indian, who has not severed his tribal relations, and who is an allottee and ward of the government, upon a charge of grand larceny committed within the state, but without the limits of an Indian allotment or other Indian country. Relator obtained his allotment under and by virtue of

the act of Feb. 8, 1887, 3 Fed. Stat. Ann. (2d ed.) 821, and acts supplementary thereto and amendatory thereof, known as the "Dawes Act," the title of which reads:

"An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians and for other purposes."

It is contended that, by section 6 of the Dawes Act, Congress intended that such allottee Indians should not become subject to state laws until the expiration of the trust period and the conveyance of the allotted land by patent in fee, and that when the supreme court of the United States held that, under this section, an allottee Indian became a citizen upon receiving his allotment (*In re Heff*, 197 U. S. 488), Congress proceeded, by its amendment of May 8, 1906, to make certain its meaning, and to overcome the rule of the *Heff* case, by providing thereby:

"That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this Act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside." 3 Fed. Stat. Ann. (2d ed.), p. 830.

But though Congress may have intended to overcome the ruling in the *Heff* case by this subsequent legislation, it does not follow that it intended thereby that the state or territory in which the Indian might reside should be deprived of jurisdiction to proceed against such Indian allottee, not yet a citizen, for a violation of its criminal laws. By the enabling act, Washington was authorized to adopt a constitution, establish a state government, and was admitted into

the Union upon equal footing with the original states, which carried with it the full power of enacting laws against crimes and punishing all those within her borders who might transgress such laws, be they citizens or not. This must be so, since the state became sovereign, with full power, except only those powers which had been delegated to the national government. And relator has not contended, and cannot contend, that any power was ever delegated to the national government to enact or enforce criminal laws applicable within the territorial limits of any state, except only those portions thereof which were exclusively within the jurisdiction of the Federal government, such as Indian reservations and the like. What is still known as the south half of the diminished Colville Indian reservation is no longer an Indian reservation. By virtue of the act of Congress of March 22, 1906, the president of the United States, by his proclamation of May 3, 1916, restored all of the south half of the diminished Colville Indian reservation to the public domain, subject only to the reservations and allotments of land in severalty to the individual Indians. Moreover, Congress has never attempted to enact any criminal statute dealing with any act committed by an Indian outside of the territorial jurisdiction of the United States. And the only legislation by Congress concerning crimes committed by Indians, to which our attention is called, is § 2145 of the Revised Statutes, which in part provides:

"The general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country."

Where Congress has attempted to exercise no jurisdiction, it requires something more than ingenious

and pleasing argument to convince us that the state is powerless to maintain her dignity and enforce her laws as against any individual within her boundaries, no matter what his status may be as to citizenship or lack of it. Without prolonging this opinion or quoting from the many decisions which, in our judgment, are applicable, we regard the case of *Ward v. Race Horse*, 163 U. S. 504, as directly in point, and the learned opinion of the present Chief Justice of the supreme court of the United States, there given, we think answers every contention raised by relator. That this decision was rendered prior to the amendment of May 8, 1906, to the Dawes Act, cannot be urged as a reason why it is not now applicable, because, after the admission of this state to the Union, Congress had no power to take away or abridge any of its sovereign rights, and if the amendment referred to be construed as an attempt to do so, it must be held to have failed of its purpose.

Writ denied.

CHADWICK, C. J., MOUNT, MITCHELL, and HOLCOMB, JJ., concur.

[No. 15200. Department Two. May 29, 1919.]

MAURICE S. LINDHOLM *et al., Respondents,* v. E. A. PATRICK, *Appellant.*[1]

SPECIFIC PERFORMANCE (47)—DEMAND AND REFUSAL—EVIDENCE—SUFFICIENCY. In an action for specific performance of a contract whereby defendant agreed to purchase a certificate of sale of property to be bid in for his benefit, plaintiff sustained the burden of proof as to demand and refusal to perform, where the evidence showed a specific demand by an attorney and readiness on plaintiff's part to perform and defendant's refusal, the land having in the meantime been sold on the foreclosure of a prior mortgage.

ACTION (10)—LEGAL OR EQUITABLE. An action to compel the specific performance of a contract whereby defendant agreed to purchase and pay for a certificate of sale, is not an action for damages in the sense of excluding equitable jurisdiction.

SPECIFIC PERFORMANCE (31-1) — CONDITION PRECEDENT — TENDER. Where a tender of performance was made and absolutely refused, the continuance of the tender is not a prerequisite to the maintenance of an action for specific performance of the contract on the part of the defendant.

SAME (5)—DEFENSES—FAILURE OF TITLE. An agreement by a defendant, a mortgagor, to purchase a certificate of sale on the foreclosure of a second mortgage, bid in for his benefit by plaintiff, is not excused by the foreclosure of the first mortgage, since such loss was defendant's fault in failing to discharge his own obligation to pay the same.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered March 8, 1918, upon findings in favor of the plaintiffs, in an action for specific performance, tried to the court. Affirmed.

John M. Gleeson, for appellant.

A. E. Gallagher, for respondents.

HOLCOMB, J.—Appellant, Patrick, was the owner of certain land situated in Lincoln county, Washington, on which was a first mortgage lien. In consideration

[1]Reported in 181 Pac. 876.

of the loan of certain money by the respondent Lindholm, the appellant executed to Lindholm a second mortgage upon the same premises. Upon the commencement of an action to foreclose this second mortgage by Lindholm, an agreement was entered into between Patrick and Lindholm, the general terms of which were that Lindholm and wife agreed to bid in the property at the ensuing foreclosure sale at the amount due upon the second mortgage, and that, if the property were sold to Lindholm for the amount of such second mortgage, Lindholm would sell and assign the certificate of sale to Patrick at any time within twelve months thereafter, upon the payment by appellant to respondent of the amount bid by the respondent and any interest, taxes or sum that respondent might pay on a prior mortgage on the land, the agreement further stipulating as follows:

". . . said E. A. Patrick agrees and binds himself absolutely to purchase said certificate of sale from the plaintiff (Lindholm) in case said property or any part thereof is sold to the plaintiff at said sale, and to pay the plaintiff above named therefor in cash the sum for which said property is sold to plaintiff, on or before twelve months from the date of such sale of said land to plaintiff in said foreclosure proceedings, together with interest on the sum for which said land may be sold to the plaintiff from the date of such sale at the rate of eight per cent per annum until paid."

At the sheriff's sale, pursuant to the foreclosure proceedings on the second mortgage, Lindholm bid in the property at the sum of $1,019, and received the sheriff's certificate of sale.

During the ensuing twelve months, appellant paid to respondent no part of the sum so paid by respondent, as he had agreed in the foregoing instrument. The evidence shows that, shortly after the expiration of the period provided for in the contract, demand was made

upon Patrick for the performance of his part of the agreement. Although it is denied, we view the evidence as showing that Gallagher, as attorney for Lindholm made a specific demand upon Patrick for performance within a reasonable time after the lapse of the contractual period, which demand was accompanied by an offer on respondents' part to specifically perform their obligation under the contract by assigning the certificate of sale to Patrick, which offer Patrick refused, saying he would not pay anything, nor accept any assignment of the certificate of sale. As we have said, this is contradicted by Patrick, but the trial court had the witnesses before it, and although the witnesses were interested, the court was able to judge of their credibility. We are of the opinion that the plaintiffs sustained the burden of proof in this regard, and that such proof shows that Patrick absolutely refused any demand for specific performance, or offer of performance by the respondents. Respondents brought into court, and tendered at the trial, an executed assignment of the sheriff's certificate of sale, and also a quit-claim deed as a further assurance of their good faith and readiness to perform. It transpired at the trial that the land in question had in the meantime been sold under foreclosure of the first or prior mortgage, and that the appellant was a party of record to such foreclosure action.

The chief questions raised on this appeal are, (1) was this properly an action in equity; (2) was a tender of the assignment of the certificate of sale by Lindholm a condition precedent to this action; and (3) whether the loss of the legal title to both respondent and appellant, by the subsequent foreclosure of the first mortgage, avoided the liability of appellant upon his written contract.

The distinction which this case suggests between a case at law and a case in equity has been very clearly defined by a number of learned courts. In *Rindge v. Baker*, 57 N. Y. 209, 15 Am. Rep. 475, it is said:

"If it [the action] be brought for *damages* for breach of contract, it is a case at law; if it be brought for money, by way of performance of the contract, it is a case in equity. Thus, where a vendor in a contract for the sale of land sues for the price, his action is equitable."

Here there is no claim for damages; the action is plainly one to compel the appellant to perform his contract for the payment of a sum of money, such contract being one of mutuality, allowing to appellant an action for specific conveyance had the conditions of the case been reversed. In *Rock Island Lumber & Mfg. Co. v. Fairmount Town Co.*, 51 Kan. 394, 32 Pac. 1100, the court said:

"A vendor of lands seeking the payment of the purchase money may maintain an action against the vendee for the specific performance of the written contract of sale upon the principle of mutuality of remedy. Wat. Spec. Perf. Secs. 14-16."

See, also, Pomeroy, Specific Performance, § 6; 2 Beach, Equity Jurisprudence, § 636; Tiedeman, Equity Jurisprudence, § 493.

Obviously, this is not damage in the sense of excluding equitable jurisdiction. The mere fact that a judgment is for money is not determinative of the character of an action as at law or in equity. Though not cited as directly in point, the recent decision in *Salt v. Anderson, ante* p. 149, 180 Pac. 873, and the cases therein cited, is of importance in this aspect of the argument. We conclude that the court below was properly sitting in equity.

On the question of the necessity of tender as a condition precedent to maintaining this action, what we have above indicated as the proof shown on the trial of the case in regard to the proffer of performance by respondent and his attorney, and its rejection by the appellant Patrick, brings this contention squarely within the well-established rule, repeatedly announced by this court as being supported by universal authority, that it is not necessary to continue a tender when the party for whose benefit the tender or the proffer of performance has been made repudiates the contract, for the reason that the law will not compel any one to do an idle thing.

In the case of *Kane v. Borthwick*, 50 Wash. 8, 96 Pac. 516, 18 L. R. A. (N. S.) 486, this court, speaking by Judge Rudkin, quotes with approval from 28 Am. & Eng. Ency. Law (2d ed.), page 5, as follows:

"'The maxim that the law does not compel one to do vain or useless things applies to the case of tender of performance of an obligation. Hence a tender is not necessary where it appears that, if made, it would have been fruitless. The general rule may be stated as follows: An actual tender of performance may be excused when there is a willingness and an ability to perform, and actual performance has been prevented or expressly waived by the parties to whom performance is due. It appears then, that to excuse a failure to make an actual tender, there must be an existing capacity to perform, coupled with a state of facts which establishes the futility of making the tender.'"

See, also, *Livieratos v. Commonwealth Security Co.*, 57 Wash. 376, 106 Pac. 1125; *Weinberg v. Naher*, 51 Wash. 591, 99 Pac. 736, 22 L. R. A. (N. S.) 956.

The third and last contention is that respondents' inability to convey title avoids appellant's liability. It is the well settled doctrine of this and other jurisdictions that an action for the specific performance of

a contract to convey real property will not lie in favor of one who knows, prior to the commencement of such action, that the defendant is incapable of performing the contract for want of title. *Morgan v. Bell,* 3 Wash. 554, 28 Pac. 925, 16 L. R. A. 614; *Peters v. Van Horn,* 37 Wash. 550, 79 Pac. 1110. The instant case is clearly distinguishable from the foregoing. Title was lost to either of these parties by the foreclosure of the first mortgage; but that was a condition directly the result of appellant's own action in placing such first mortgage upon his land, and was not an act or thing done by respondents. The respondents did not agree to pay off or protect against the first mortgage; they merely reserved the right to do so. Neither did the respondents procure the foreclosure of the first mortgage; that occurred by reason of the appellant's failure to discharge an obligation he himself had voluntarily incurred.

The judgment is affirmed.

CHADWICK, C. J., FULLERTON, MOUNT, and PARKER, JJ., concur.

[No. 15361. Department One. May 29, 1919.]

C. D. HILLMAN *et al.*, *Petitioners*, v. E. M. GORDON *et al.*, *Respondents*.[1]

APPEAL (244)—SUPERSEDEAS—BY SUPREME COURT. Under Const., art. 4, § 4, authorizing the supreme court to issue writs in aid of its appellate jurisdiction, the supreme court will grant a supersedeas to judgment debtors, on their appeal from an order refusing to vacate a judgment obtained by fraud, upon giving bond in double the amount of the balance due, where it appears that proceedings were pending to enforce the judgment and if property was sold pending the appeal it would probably not be possible to put the parties in *statu quo*.

Application filed in the supreme court May 5, 1919, to fix the amount of a supersedeas bond, or for a writ of mandamus directing the superior court for King county, Ronald, J., to allow and fix the amount of such bond. Granted.

Carroll B. Graves, for petitioners.

Byers & Byers and *Aust & Terhune*, for respondents.

MAIN, J.—This is an application to this court to fix the amount of a supersedeas bond on an appeal from a judgment or order of the superior court, and, in the alternative, for a writ directing the superior court to allow and fix the amount of the supersedeas. The application is based upon the following facts: On the 5th day of January, 1918, in the superior court of King county, in an action in which E. M. Gordon and Eva P. Gordon, his wife, were plaintiffs, and C. D. Hillman and Bessie Olive Hillman, his wife, were defendants, a judgment was entered in favor of the plaintiffs and against the defendants in the sum of $44,500, together with interest at the legal rate. Since the entry of this judgment, the same has been reduced

[1]Reported in 181 Pac. 677.

by credits in the amount of $17,139.98, leaving a balance due thereon, aside from the interest, of $27,360.02.

After the entry of this judgment, and on the — day of May, 1918, the defendants therein petitioned the superior court to vacate the same on the ground that it had been taken against them through mistake, inadvertence, surprise and excusable neglect, and for fraud practiced by the plaintiffs in obtaining the judgment, and because of the death of one of the parties, to wit, Eva P. Gordon, before the judgment had been rendered. Upon this petition, the matter came on for hearing in the superior court, and on the 26th day of April, 1919, an order was entered which denied and dismissed the petition. From this order, the petitioners, the defendants in the original action, have appealed.

They applied to the superior court to fix the amount of the supersedeas bond and to stay the proceedings under the judgment sought to be vacated, pending the appeal, but this the trial judge declined to do, being of the opinion that he was without jurisdiction to make such an order.

Prior to the entry of the judgment, on January 5, 1918, one of the plaintiffs, Eva P. Gordon, died intestate, leaving two minor heirs, and, at the time of the rendition of the judgment, neither her personal representatives nor minor heirs were substituted as parties in the action.

Under the judgment, the plaintiffs have taken certain proceedings to collect the same in this state and in the state of California. The trial judge having declined to fix the amount of the supersedeas, the defendants in the original action, the petitioners to vacate, applied to this court, as above stated, to fix the amount of a supersedeas bond, and in the alternative,

for an order directing the superior court to allow and fix the amount of such bond.

The first question to be determined is whether this court has the power to fix such a bond. The constitution of the state, § 4 of article IV, among other things, provides that this court shall have power to issue all writs necessary and proper to the complete exercise of its appellate or revisory jurisdiction. Under this constitutional authority, the court may, in the exercise of its discretionary power, in a proper case, fix the amount of a supersedeas bond in an action pending on appeal. *Campbell Lumber Co. v. Deep River Logging Co.*, 68 Wash. 431, 123 Pac. 596.

The court having the power, in a proper case, to fix the amount of a supersedeas bond, the question arises whether the facts presented make such a case. In determining this question we must take into consideration the effect upon the petitioners if no bond should be permitted and the order dismissing the petition in the superior court should be reversed on appeal. We must also take into consideration the effect upon the opposing parties if the bond should be authorized and the judgment affirmed on appeal. If no bond should be required and the order should be reversed, any proceedings under the original judgment would be of no avail. If property had been taken and sold on execution, its restoration would be necessary or damage for such taking would accrue. This would lead, in view of the facts presented by the record, to litigation in which it probably would not be possible to put the parties in *statu quo*, and the remedy by damages would not be certain and sure. On the other hand, if the supersedeas bond is allowed and the judgment is affirmed, the plaintiffs in the original action will be amply pro-

tected and their recovery upon the judgment is made certain. The delay would be compensated by the legal rate of interest upon the amount of the judgment still unpaid.

It therefore appears to us that, in the interests of justice, the situation calls for the granting of a supersedeas order which will, as near as possible, preserve the *status quo* of the parties until the appeal from the order denying the petition to vacate can be determined. As to the amount of the bond, we think this should be in the sum of $54,720.04, which is double the amount of the balance due on the judgment, exclusive of interest.

The effect of allowing the supersedeas is to stay any proceedings looking to the collection of the judgment, which was for the recovery of money. Had an appeal been taken from the original judgment, the statute would require a bond in double the amount thereof. The defendants, having petitioned for the vacation of the judgment and appealed from the order denying the relief there sought, should not be placed in a more advantageous position with reference to the amount of the bond than they would have been had they taken a direct appeal. If the petitioners were only asking to be relieved of the judgment to the extent of the value of the property upon which execution had been levied, a different question as to the amount of the bond would be presented.

In view of the disposition here made of the matter, it is unnecessary to consider or determine the other questions presented upon the argument.

It is therefore ordered that the petitioners shall have the right to stay the judgment by filing in the office of the clerk of the superior court, within five days after receiving notice of this order, a bond in the penal sum

of $54,720.04, properly conditioned as a supersedeas and stay bond.

CHADWICK, C. J., MITCHELL, FULLERTON, and TOLMAN, JJ., concur.

[No. 15008. *En Banc.* May 31, 1919.]

NELLIE M. (Known as Daisy) LOGAN, *Respondent*, v. NEW YORK LIFE INSURANCE COMPANY, *Appellant*.[1]

INSURANCE (34) — LIFE POLICY — VALIDITY — DELIVERY WHILE IN GOOD HEALTH. Where insured died nine days after delivery of a policy, which from the undisputed testimony of experts was from a disease (tumor of the brain) which had existed for months and from which he was ailing at the time of delivery, it conclusively appears that the policy was not delivered to the insured in his lifetime in good health, as required by the policy in order that it take effect.

SAME (34) — DELIVERY WHILE IN GOOD HEALTH — WARRANTIES. A policy providing it shall not take effect unless delivered to the insured in his lifetime in good health is not governed by Rem. Code, §§ 6059-34 and 6059-184, relating to the effect of oral or written misrepresentations or warranties or statements made in the negotiations or by the insured; since the condition is not a warranty or statement within these statutes.

SAME (34, 176)—DELIVERY WHILE IN GOOD HEALTH—BURDEN OF PROOF. When the policy has been delivered and the first premium paid, the burden of proof is upon the insurance company to show that the policy was delivered while the insured was not in good health, and for that reason did not become effective.

PARKER, HOLCOMB, FULLERTON, and TOLMAN, JJ., dissent.

Appeal from a judgment of the superior court for Grays Harbor county, Sheeks, J., entered June 22, 1918, upon the verdict of a jury rendered in favor of the plaintiff, in an action upon a life insurance policy. Reversed.

[1]Reported in 181 Pac. 906.

Lee & Kimball and *Bridges & Bruener,* for appellant.

A. Emerson Cross and *John C. Hogan,* for respondent.

MOUNT, J.—This action was brought upon a policy of life insurance issued by the defendant upon the life of Allen Mitchel Logan. The plaintiff was named as the beneficiary therein. The complaint alleged, in substance, that the policy was delivered to the insured on July 28, 1916; that the first premium was paid; that the insured died on August 6, 1916; that proofs of death were furnished in accordance with the terms of the policy, and that the defendant refused to pay. The answer of the defendant admitted the issuance and delivery of the policy and that the premium was paid; that the insured died as alleged; but denied any liability by reason of the alleged fact that the insured was not in good health at the time the policy was delivered, and that the policy was obtained upon false and fraudulent representations. Upon these issues the case was tried to the court and a jury. A verdict was returned in favor of the plaintiff for the full amount of the policy. At the close of the evidence, the defendant moved for a directed verdict, which motion was denied. After verdict the defendant moved for judgment notwithstanding the verdict, which motion was also denied, and judgment was entered in favor of the plaintiff for $5,000, the amount of the policy. The defendant has appealed from that judgment.

Upon the trial of the case it appeared, without dispute, that the insured, during his lifetime, on the 27th day of June, 1916, made an application for the policy sued upon. This application contained the following clause:

"I agree as follows: 1. That the insurance hereby applied for shall not take effect unless the first premium is paid and the policy is delivered to and received by me during my lifetime and good health, and that unless otherwise agreed in writing, the policy shall then relate back to and take effect as of the date of this application; . . ."

It was stated in the application that the insured desired the policy to date from July 25, 1916. Thereafter, the insured was examined by a physician, the report of the physician was sent to the insurance company and the policy was issued. It was delivered to the insured on the 28th day of July, 1916, and the first premium was paid at that time. The insured died suddenly, from a tumor of the brain, on August 6, 1916, nine days after the delivery of the policy. It is shown, without dispute, that, after the application was made for the policy, but before the policy was delivered, the insured had several spells of illness, one on June 22d, another on July 3d, and another on July 17th; that, upon these occasions, he suffered from severe headache, nausea, chills and poor heart action; and that, nine days after the policy was delivered, he had another of these spells, from which he died. Upon a *post-mortem* examination it was found that he died from a tumor of the hypophysis. Upon the trial of the case, four doctors qualified as experts and testified, in substance, that this disease was of slow growth, running over months or years, and that symptoms of the disease were such as the insured had manifested prior to the delivery of the policy in question. There was no evidence in the record that this disease which resulted in the death of the insured could have originated within the period between the date the policy was delivered and the date of the insured's death. All

the evidence is to the effect that the disease could not have originated within that time.

Upon this state of facts, we are satisfied that it was the duty of the court to have directed a judgment of dismissal at the close of the evidence. The rule is stated in 14 R. C. L., page 900, at § 78, as follows:

"Where a completed contract of life insurance exists it is immaterial that the insured was not in good health at the time of the delivery of the policy evidencing the contract. However, applications for policies of life insurance, as well as policies, frequently provide that the policy shall not take effect unless it is delivered to the insured and the first premium paid while he is in good health, and such a provision is valid and enforceable, and it is immaterial that the condition of the insured has not changed since his application was made; or that the insured was ignorant of his condition."

The text is well supported by foot notes.

Murphy v. Metropolitan Life Ins. Co., 106 Minn. 112, 118 N. W. 355, was a case where a policy was issued on May 7, 1906. On April 23d, a physician had examined the insured and found a swelling of the knee. He treated the insured up to June 7th, when the knee was placed in a cast. In August the knee was operated upon for malignant tumor, from which the insured died. The policy contained a clause like the one in question. The court there said:

"It is clear from the language of the policy that the defendant's promise of insurance was not absolute, but conditional, and that the existence of life and sound health in the insured on the date of the policy is the condition upon which the promise is made. It is the fact of the sound health of the insured which determines the liability of the defendant, not his apparent health, or his or any one's opinion or belief that he was in sound health. Therefore, if the insured was not in fact in sound health on the date of the policy, the

defendant is not liable unless it has waived the defense. . . . The term 'sound health,' as it is used in this policy, does not mean perfect health, but an absence of any disease that has a direct tendency to shorten life."

In *Paine v. Pacific Mut. Life Ins. Co.*, 51 Fed. 689, the court said:

"Conceding that the application was accepted on June 7, 1890, by the defendant, it expressly provided that the contract of insurance should take effect and be in force only upon compliance with three conditions precedent, viz, that a policy should be delivered, that it should be delivered during the life and good health of the applicant, and that the premium should be paid when the policy was delivered. These conditions were never complied with. The vital, indispensable condition was that the policy should be delivered and take effect during the life and good health of the applicant; but that life had ended, that applicant was no more, and that condition could never be complied with, and therefore the contract could never take effect."

In *Metropolitan Life Ins. Co. v. Howle*, 62 Ohio St. 204, 56 N. E. 908, the court said:

"The condition in the policy is that there shall be no obligation assumed by the company, unless upon the date of the policy the insured, the wife, shall be alive and in sound health. The matter of life and sound health is not made to depend upon her knowledge thereof, but upon the fact itself. She might be dead and not be conscious of it, and she might be in unsound health and not know it, but either would alike defeat a recovery."

In *Gallant v. Metropolitan Life Ins. Co.*, 167 Mass. 79, 44 N. E. 1073, the court said:

"The company made its own contract, a part of which was that no obligation was assumed by the company unless, at the time when the policy was issued the insured was 'alive and in sound health.' If, in

fact, the insured at that time was not in sound health, the defendant is not liable on the policy, and this fact can be shown by any competent evidence."

In *Metropolitan Life Ins. Co. v. Willis*, 37 Ind. App. 48, 76 N. E. 560, the court said:

"The policy recites that it is issued upon the written application of the insured, and that no obligation is assumed, unless, on the date the policy is delivered, 'the insured is alive and in sound health.' The evidence shows conclusively that he was not in 'sound health' when the policy was delivered. It is unnecessary to cite authorities in support of the proposition that an insurance company has the right to make such conditions a part of its contract of insurance. These undisputed facts establish such a breach of the contract as to relieve appellant of liability."

In *Yount v. Prudential Life Ins. Co.* (Mo. App.), 179 S. W. 749, the court said:

"No contract could come into existence until his proposal had been accepted upon the terms required, and notice of such acceptance conveyed to him. . . . Clearly a delivery of the policy to the applicant during his lifetime and while he was in good health was required before the things done by the parties could ripen into a contract. It was a condition precedent to a completion of the contract."

And in *Gallop v. Royal Neighbors of America*, 167 Mo. App. 85, 150 S. W. 1118, the court said:

"Parties to a contract of insurance have the undoubted right to agree on the terms of their contract and to declare when and under what conditions the contract shall go into effect. . . . And where the parties agree in the application that the contract of indemnity shall not take effect until the delivery of the policy at a certain time and under certain specified conditions, such agreement will be enforced if it is one the parties lawfully could make. . . . The physical state the contract was intended to have existent at the time it became effective as a contract of indemnity was

in the nature of a condition precedent. . . . And since that condition had failed before the delivery of the certificate, it must follow that the contract at no time came into being."

Numerous other cases to the same effect might be cited. The parties to this contract agreed that it should not take effect unless the first premium was paid and the policy delivered to, and received by, the insured in his lifetime and good health. It is proven conclusively that, at the time the policy was delivered, the insured was not in good health. He died nine days afterwards from a disease which the evidence shows had existed for months, or probably years, before the delivery of the policy. It is true the applicant was unconscious of the fact that he was ailing from that disease; and for that reason, no doubt, he agreed that the policy should not take effect until it was delivered to him in his lifetime and good health.

The jury in this case, upon special interrogatory submitted to them, answered that the insured was in good health at the time the policy was delivered. But there is no evidence in the record to support this finding. In fact, the entire evidence is to the effect that the insured was ailing before the policy was delivered; that the symptoms which he had before the policy was delivered were the symptoms of tumor of the brain. While the physicians who attended him upon these different occasions were unable to diagnose the case as tumor of the brain, it was discovered upon his death that this was the cause of his death. There was no evidence, and none can reasonably be anticipated, that the disease from which the insured died was one which was, or might have been, contracted after the delivery of the policy. Since there was no evidence at all to support the finding of the jury, it follows that the finding is of no force. This was the vital question in the

case, and when the evidence altogether showed that the insured was not in good health at the time the policy was delivered to him, the policy did not take effect according to the contract and according to the great weight of authority, a part of which we have hereinbefore cited.

The respondent contends that this policy is governed by the provisions of the following sections of Rem. Code:

"§ 6059-34. No oral or written misrepresentation or warranty made in the negotiation of a contract or policy of insurance, by the assured or in his behalf, shall be deemed material or defeat or avoid the policy or prevent it attaching, unless such misrepresentation or warranty is made with the intent to deceive. If any breach of a warranty or condition in any contract or policy of insurance shall occur prior to a loss under such policy, such breach shall not avoid the policy nor avail the insurer to avoid liability, unless such breach shall exist at the time of such loss under such contract or policy."

"§ 6059-184. No life insurance policy . . . shall be issued or delivered . . . unless it contains . . .

"(3) A provision that the policy and the application therefor shall constitute the entire contract between the parties and that all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties."

These provisions of the code apply to representations by the insured as inducements or upon his qualifications in his examination for the insurance, and we have so held in a number of cases. See: *Hoeland v. Western Union Life Ins. Co.*, 58 Wash. 100, 107 Pac. 866; *Woods v. Insurance Co. of Pennsylvania*, 82 Wash. 563, 144 Pac. 650; *Quinn v. Mutual Life Ins. Co.*, 91 Wash. 543, 158 Pac. 82; *Brigham v. Mutual Life Ins. Co.*, 95 Wash. 196, 163 Pac. 380; *Goertz v. Continental Life Ins. & Inv. Co.*, 95 Wash. 358, 163

Pac. 938; *Ramat v. California Ins. Co.*, 95 Wash. 571, 164 Pac. 219; *Askey v. New York Life Ins. Co.*, 102 Wash. 27, 172 Pac. 887, L. R. A. 1918 F 267.

In all these cases we had under consideration representations and statements made in order to obtain the insurance. The condition that the policy shall not take effect unless it is delivered and received by the insured in his lifetime and good health is not a warranty or statement within the meaning of the statute. Respondent apparently concedes that, if the insurance company, before delivery of the policy, had discovered the fact that the insured was in bad health, the company might then have refused to deliver the policy. Respondent also apparently concedes that, if the insured had refused to pay the premium upon the policy when it was offered for delivery, then the company might have refused to deliver the policy and the contract would not take effect. There were three conditions here which were made precedent to the contract becoming effective: first, the payment of the premium; second, the delivery of the policy; and third, the delivery during the lifetime and good health of the insured. All these conditions must concur before the contract of insurance became effective. If the payment of the premium is a condition precedent, the delivery of the policy during good health is likewise a condition precedent. It is idle to say that, where two or three conditions are named in the same clause in exactly the same way, one of them is a condition precedent and the others not.

While there are authorities to the effect that the burden is upon the respondent to prove that the policy was delivered while the insured was in good health, we think the better rule is that, when the policy has been delivered and the first premium paid, the burden of proof is upon the insurance company to show

that the policy was delivered while the insured was not in good health and, for that reason, the contract did not become effective. In this case the appellant maintained that burden, because it was clearly shown, without any dispute, that the insured died nine days after the policy was delivered; that the insured was suffering from symptoms which indicated a tumor of the brain prior to the delivery of the policy; and that a disease of this kind does not appear except through months or years of growth. So there can be no escape from the conclusion that the evidence shows beyond doubt that the insured was suffering from a tumor of the brain at the time the policy was delivered to him and that he died therefrom. There is no escape from the conclusion that the policy never took effect by reason of the agreement between the insured and the insurance company that it should not take effect unless delivered to the insured in his lifetime and good health.

We conclude, therefore, that the contract for life insurance was not completed and the policy never became effective. It is unnecessary to consider other questions presented.

The judgment appealed from is therefore reversed, and the cause ordered dismissed.

CHADWICK, C. J., MACKINTOSH, MAIN, and MITCHELL, JJ., concur.

PARKER, J. (dissenting)—I cannot see my way clear to concur in the reversal of the judgment of the trial court. I see nothing involved in this case other than the question of fact as to whether the deceased was in good health at the time of the delivery of the policy, as to which question the burden of proof, as conceded in the majority opinion, rested upon the insurance company. The deciding of this case upon the merits

by the court in favor of the insurance company is not deciding that there was no evidence to support the finding of the jury that the deceased was in good health at the time the policy was delivered; *but it is deciding, as a matter of law, that it has been affirmatively conclusively proven that he was not then in good health.* To my mind, the two or three sick spells of the deceased, occurring a short time before the delivery of the policy, and the uncontroverted testimony of the expert witnesses that, in their opinion, the deceased was not in good health at the time of the delivery of the policy, is not conclusive upon that *question of fact,* in the sense that the court is, upon such a showing, authorized to decide it in favor of the insurance company as a matter of law, contrary to the jury's finding. The jury may have believed that the deceased was in good health at the time of the delivery of the policy, notwithstanding a short time prior thereto he had two or three sick spells. The jury may have also believed that the testimony of the expert opinion witnesses was not such as to compel a finding that the deceased was not in good health at the time of the delivery of the policy. It is to be remembered that this was the testimony of human witnesses, the weight and credibility of which the jury were the judges. The mere fact that there were no expert witnesses testifying that, in their opinion, the deceased was in good health when the policy was delivered, does not take away from the jury the right and duty of weighing the testimony and being the judges of the credibility of these expert opinion witnesses. It may be that the trial court should have awarded the insurance company a new trial upon the ground that the verdict was against the weight of the evidence, and possibly the record would warrant this court in deciding that the trial court abused its discretion in

denying the motion for new trial made upon that ground. But that is quite a different matter from finally deciding the case upon the merits by this court. I think the judgment of the trial court should be affirmed; or, in any event, no disposition of the cause should be made by this court more favorable to the insurance company than to grant it a new trial.

HOLCOMB, FULLERTON, and TOLMAN, JJ., concur with PARKER, J.

[No. 15087. *En Banc.* May 31, 1919.]

NORTHERN PACIFIC RAILWAY COMPANY, *Appellant*, v. BOARD OF COUNTY COMMISSIONERS ETC. OF YAKIMA COUNTY, *Respondents*.[1]

DRAINS (16-1)—ASSESSMENT—BENEFITS TO PROPERTY—APPORTIONMENT—RAILROAD RIGHT OF WAY. An assessment for an irrigation ditch against a railroad right of way is not upon a fundamentally wrong basis and arbitrarily excessive although it averages $235 per acre, while bordering farm lands were assessed at $15 per acre and county highways at about $90 per acre, where the assessments were arrived at by concluding that the total benefits were three times the total cost of the improvement, and farm lands were charged one-third of the increased market value, while railroad right of way and county highways were held to be benefited in a certain sum each, one-third of which was assessed against them, in lieu of attempting to determine the increased market value, upon the theory that it was impracticable to so measure benefits to such property; in view of the fact that the evidence tended to show that the ditch very materially contributed to the improved condition of the roadbed making it suitable for heavier traffic (CHADWICK, C. J., MAIN, MACKINTOSH, and MITCHELL, JJ., dissent).

SAME (18)—ASSESSMENTS—BENEFITS TO PROPERTY—REVIEW. There being, under Rem. Code, § 4226-30, no appeal from the decision of the county commissioners apportioning assessments upon the property in a drainage district benefited by the construction of an irrigation ditch, the decision being final, there is a stronger presumption sup-

[1]Reported in 181 Pac. 868.

porting the apportionment of benefits than in the cases of city local improvement assessments from which appeal may be taken to the courts.

Appeal from a judgment of the superior court for Yakima county, Holden, J., entered May 27, 1918, dismissing an action to restrain the collection of an assessment, after a trial on the merits. Affirmed.

Geo. T. Reid, J. W. Quick, L. B. da Ponte, and *C. A. Murray,* for appellant.

W. B. Bridgman and *E. B. Preble,* for respondents.

PARKER, J.—The plaintiff railway commenced this action in the superior court for Yakima county, seeking the cancellation, and enjoining the collection, of a special assessment tax levied upon six and one-half miles of the right of way of the Sunnyside division or branch line of its railway, situated in drainage district No. 2, of Yakima county, to aid in the payment of the cost of the construction of drains in that district; the railway company having tendered to the county treasurer a sum which it claims is sufficient to pay an assessment lawfully chargeable to it, measured by the benefits of the improvement to its right of way. Trial in that court resulted in judgment denying to the railway company the relief prayed for, from which it has appealed to this court.

The drainage district was duly organized under chapter 176, Laws of 1913, p. 611, which is also found in Rem. Code, § 4226-1 *et seq.* The total area of the district, including farm lands, town lots, county roads, and appellant's right of way, is approximately 7,800 acres. The total cost of the improvement was $153,193, which was assessed and apportioned against all of the lands within the district, of which $14,700 was assessed against the appellant's right of way consisting of ap-

proximately sixty-two acres. Appellant's railway and right of way lies along a draw, in an easterly and westerly direction, clear across the district, for a distance of approximately six miles, which draw forms the natural main drainage course of the district. Along this draw, at all points very near to appellant's railway, was constructed the main drainage ditch of this improvement, into which were run lateral ditches from higher ground to the north, which bring to the main ditch water which would by natural drainage reach the draw. Prior to the construction of this improvement, such natural drainage seriously injured the lower lands along and to the north of the draw, causing them to be wet and so impregnated with alkali as to render them unfit for farming. When this railway line was constructed, about the year 1905, and up until the construction of this improvement, the draw was wet, soft ground along practically the entire course of the railway through the district, the water interfering with the railway by the rendering of the roadbed soft and unsubstantial, suitable only for comparatively light and slow traffic. This portion of the railway was originally constructed only as a branch to the main transcontinental line of the company; but the roadbed along the draw was later so improved that it can be, and has to some considerable extent been, used for heavy main line traffic. The construction of this improvement, especially the construction of the main line ditch along and near to the railway, has, the evidence tends strongly to show, very materially contributed to the improved condition of the roadbed, and became a factor of some considerable moment in making the roadbed suitable for heavy main line traffic.

Some two miles to the north, and approximately parallel with this portion of the railway, and on

ground about one hundred feet higher, runs the main Sunnyside irrigation canal, carrying a large quantity of water. This canal was there and in use some years before the construction of the railway along this draw, which is the natural course of the drainage from the rising ground for several miles beyond and above, as well as below, the Sunnyside canal, which ground rises above the canal, and at a point several miles to the north at the summit of Rattlesnake ridge or mountain, attains a height of some fifteen hundred feet or more above the canal, all forming a watershed of some considerable proportions, naturally draining into the draw along which the railway runs. The whole of this region is more or less arid, and the water which this improvement was designed to carry off comes largely from seepage from the Sunnyside canal, though at certain seasons of the year there comes upon the lower lands and into the draw from natural causes a considerable quantity of other water. There have been occasions before the construction of this improvement when this water caused considerable damage to the lower lands and the railway, which the improvement renders practically certain will not occur in the future.

There is no controversy here over the regularity of the proceedings leading up to the making of the assessment to pay the cost of the improvement. The only contention here made in behalf of appellant railway company being that the assessment levied upon its right of way was measured and apportioned upon a fundamentally wrong basis, and is so clearly excessive as to show arbitrary action on the part of the assessing officers. The sixty-two acres of railway right of way being charged with $14,700 of the cost of the improvement, it will be noticed that such assess-

ment was at an average rate of about $235 per acre. The farm lands bordering upon appellant's right of way were assessed at an average rate of about $15 per acre, while other farm lands on ground a little higher were assessed at an average of about $20 per acre. Town lots were assessed somewhat higher in proportion to area than farm land, a few of them being assessed as high as $200 per acre. The assessment against Yakima county for the improvement of its highways by drainage within the district was approximately $90 per acre of the area of such highways.

The evidence produced upon the trial in the superior court, we think, warrants the conclusion that the assessing officers arrived at the amounts they charged against the several properties within the district, and measured the benefits resulting thereto from the construction of the improvement, substantially as follows: The assessing officers concluded from their investigations that the actual total benefits resulting from the improvement to all the lands and roads in the district was approximately three times the total cost of the improvement. They then charged against the farm lands and town lots the several amounts they concluded would equal one-third of the increased market value of such lands and lots resulting from the improvement. We note that they charged the lowest lands along the railway proportionately less per acre than those lying a little higher, for the reason that the lowest lands were impregnated with alkali to a greater extent than those a little higher, and were, therefore, less valuable, even though drained, than the higher lands; and also for the reason that the draining of the lowest lands constituted only a comparatively small part of the work of completely reclaiming them as agricultural lands, it being necessary to thereafter work the alkali out of them.

In determining the amounts to be charged against the county highways and appellant's right of way, the assessing officers concluded from their investigations that the actual cost of an improvement of this nature, in so far as it resulted in direct benefit to the county highways and appellant's right of way, would be a certain sum as to each, one-third of which they charged to the county and the railway company, respectively. They adopted this method of measuring of the benefits to the county highways and to appellant's right of way in lieu of attempting to determine the increased market value thereof, upon the theory that it was impractical to so measure benefits as to such property. The assessing officers concluded from their investigations that the improvement to appellant's right of way was one which the owners of such property, situated and menaced as it was for want of proper drainage, would be reasonably expected to make, and that to make such an improvement to the extent of the portion thereof that this improvement benefited appellant's right of way would have cost appellant approximately three times the amount assessed against it.

The act of 1913, under which this drainage district was created, the improvement constructed, and the assessment levied to pay the cost thereof, does not prescribe any rule or method for the measuring and apportioning of the benefits to the several properties within the district, the only requirement in that respect being that found in section 25 of the act, that the appraisers, whose duty it is to make and apportion the assessments, after the determination of the total cost of the improvement, "shall proceed to carefully examine the drainage system and the public and private property within the district and fairly, justly

and equitably apportion the grand total cost of the improvement against the property and the county or counties, cities and towns within the district, in proportion to the benefits accruing thereto." Laws of 1913, p. 628; Rem. Code, § 4226-25. Section 29 (Id., § 4226-29) of the act expressly authorizes the assessing of railroads, as well as public highways and other property in the district, in proportion to the benefits accruing thereto from the improvement.

The contention that the assessment of appellant's right of way was made and apportioned by the assessing officers upon a fundamentally wrong basis is rested upon the theory that it was erroneous to measure the benefits resulting to appellant's right of way by taking into consideration the actual cost of the improvement, in so far as the portion thereof which benefited the right of way is concerned, and then charging one-third of such cost against the right of way. We are unable to see anything inequitable in this manner of arriving at the proportional benefits resulting to the right of way, in view of the fact that it was practically impossible to arrive at the proportional benefits resulting to the right of way by looking merely to the increased market value thereof resulting from the improvement, as was practical with reference to the farm lands and lots; the fact that the cost of that portion of the improvement directly benefiting the right of way could be approximately determined; and the fact that it was such an improvement as was reasonably necessary to the railway company in the light of existing conditions; all of which facts are not only to be presumed in aid of the conclusions of the assessing officers, but which conclusions we think are amply supported by the evidence produced upon the trial of the case in the superior court.

Counsel for appellant cite and rely upon our recent decision in *Oregon-Washington R. & Nav. Co. v. Board of Com'rs of Yakima County,* 103 Wash. 480, 175 Pac. 37. A critical reading of that decision will show that, in making the assessment there in question, "before proceeding to the levy, an arbitrary sum was agreed upon" by the assessing officers, "to be assessed against appellant;" that the assessing officers in assessing appellant's right of way took into consideration the fact "that the drainage will dry up and make the county roads in the vicinity more accessible so that the patrons of appellant's road may more conveniently patronize it;" and that these considerations on the part of the assessing officers caused them to materially increase the assessment they laid upon appellant's right of way. We think this record fails to show that any such considerations, or others of a similar import, were entertained by the assessing officers in making this assessment, in the sense that they were thereby influenced to add to the assessment against appellant's right of way.

Nor do we think that the evidence in this case shows, with that conclusiveness required in such cases to defeat assessments of this nature, that it warrants the court in holding that this assessment upon appellant's right of way was capriciously or arbitrarily made by the assessing officers without the exercise of honest judgment on their part, or that such assessment is excessive or inequitably apportioned as against appellant's right of way. The mere fact that the assessment against the right of way is higher than upon adjoining farm lands, when measured merely by the acre, we think is not at all controlling in this case, in view of the nature of the improvement and its comparative benefit to the right of way and the adjoining

farm lands. Were it our duty to personally view and examine the improvement and apportion the benefits as an original proposition, it is possible we might arrive at a different conclusion from that of the assessing officers, and one more favorable to appellant. But that is not our province. This is an original action in equity, the object of which is to set aside the assessment upon the ground, in its last analysis, of fraud. Neither the superior court nor this court entertains this action as one upon appeal from the decision of the assessing officers. The act provides, in § 30 (Id., § 4226-30) for a hearing upon the question of benefits and their apportionment, before the board of county commissioners, where objection by the owners to the assessments made by the appraisers shall be considered by the board, which, so far as the assessment proceeding is concerned, is the tribunal of final hearing upon the question of benefits and the apportionment thereof. There is no appeal provided by this act from the decision of that board to the courts. This leads us to remark that, therefore, this assessment comes to the courts with even stronger presumptions supporting the decision of that board as to the benefits and the apportionment thereof than in those cases of city local improvement assessments, as to which the statute expressly provides for an appeal to the courts from the decisions of city councils confirming such assessments.

We are of the opinion that, upon the showing made in this record, we would not be warranted in disturbing the judgment of the superior court denying to appellant railway company the relief it prays for.

The judgment is affirmed.

MOUNT, FULLERTON, TOLMAN, and HOLCOMB, JJ., concur.

MAIN, J. (dissenting)—In my opinion, this case is controlled by the case of the *Oregon-Washington R. & Nav. Co. v. Board of Com'rs of Yakima County,* 103 Wash. 480, 175 Pac. 37, and upon the authority of that case, the judgment should be reversed.

In that case, the railway company's right of way, figured as acreage, was assessed five times as much as the assessment of the adjoining property. It was there held that the assessment was upon a fundamentally wrong basis. In the present case, the railway company's right of way, figured as acreage, is assessed fourteen or fifteen times as much as the adjoining property.

It is true that, in the former case, the commissioners, prior to making the assessment, had in mind an arbitrary sum which was agreed upon to be assessed against the right of way, but the opinion is not rested upon this. It is stated therein that this fact would not avoid the assessment if it could be sustained in reason.

If the assessment in the former case, as there held, was upon a fundamentally wrong basis, it necessarily follows that the assessment in this case is likewise objectionable for the same reason.

I therefore dissent.

CHADWICK, C. J., MACKINTOSH, and MITCHELL, JJ., concur with MAIN, J.

[No. 15101. Department One. May 31, 1919.]

JOHN R. MILLER, *Respondent*, v. GEORGE H. KEMPER, *Appellant*.[1]

PARTNERSHIP (30) — ACTIONS — NECESSITY OF ACCOUNTING. One partner cannot, before dissolution of the partnership, maintain an action against his copartners to recover advances made to the partnership, such advances not being made to the other partners as individuals (CHADWICK, C. J., dissenting).

PLEADING (6) — COMPLAINT — CONCLUSIONS. A complaint upon a written contract cannot be aided by pleading an interpretation of it contrary to the legal effect of the agreement.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered April 22, 1916, in favor of the plaintiff, upon overruling a demurrer to the complaint, in an action by a partner to recover money advanced to the partnership. Reversed.

Parr & Marts, for appellant.

Thos. M. Vance, for respondent.

MACKINTOSH, J.—The respondent and appellant and George B. Branch entered into a partnership agreement looking towards the operation of a farm owned by them, the agreement providing, among other things, that:

". . . during the absence of said Kemper the other partners may expend such amounts as may be necessary to the upkeep or improvement of the place, notifying said Kemper of such expenditures. If they pay out their own private funds they are to be allowed six per cent interest on such amounts expended until reimbursed, but under no circumstances are they, or either of them, to buy goods on credit, or in any way obligate the ranch for supplies to an amount over $250, unless the funds are on hand to pay such obligations, either of their own or the company's funds."

[1]Reported in 181 Pac. 859.

The complaint, after calling attention to this agreement, states that the partnership is still continuing, not having been dissolved, and that the respondent "has advanced to the said partnership and for its use and benefit in the upkeep and improvement of the farm property, a total sum of $14,171.03"; it is then alleged that the three partners have contributed the sum of $36,008.75, and that each partner's contribution should be one-third of that sum, and that the respondent, by reason of his advancement, has contributed more than his share, and that the sum of $399.91 "represents the contribution to the partnership capital made by the respondent to the benefit individually of the appellant." To this complaint the appellant demurred, and the demurrer being overruled, and he standing upon it, judgment was entered in accordance with the prayer of the complaint.

The complaint attempts to interpret the portion of the partnership agreement which we have quoted, in this manner:

". . . that by the terms of the partnership agreement each partner was authorized to advance moneys for the use and benefit of the said partnership as might become necessary in the improvement or upkeep of the said farm, and when such advancement was made the partner so making the advancement was and is to be allowed six per cent interest on such advancements, the *same becoming a charge* against the other two partners in proportion to their interest and investment."

Respondent concedes the rule to be that one partner cannot sue another, before dissolution of the partnership, on a claim growing out of the partnership business. The appellant asserts his right to be relieved from the operation of this rule of law by resort to the exception that one partner may sue another on an obligation which does not grow out of the partner-

ship, although it may in some degree relate to the partnership, the appellant claiming that the advancement was not made to the partnership, but was an advancement to his partners as individuals. It is, of course, true that there obtains such an exception to the rule, and one partner may sue another for advancements which he has made to the other, which advancements may have been used in the partnership business; but this exception cannot be invoked in the present case, for, as we read the contract, the advancements which are sought to be recovered here are, by the terms of the agreement, advancements made to the partnership, and constitute a loan on the part of the respondent to the partnership which cannot be collected until after an accounting has been had and primary creditors have been protected and the partnership dissolved.

That portion of the complaint which seeks to charge the advancement against the appellants individually is not good against the demurrer, for the reason that it is an interpretation which the pleader has put upon a written instrument, an interpretation contrary to our view of the agreement. The complaint, disregarding this improper interpretation, does not state facts sufficient to constitute a cause of action, and the demurrer should have been sustained.

The judgment of the lower court will be reversed.

MAIN, TOLMAN, and FULLERTON, JJ., concur.

CHADWICK, C. J. (dissenting) — By articles signed December 10, 1910, the three parties became equal in a partnership of indeterminate duration. There is no provision in the contract fixing or limiting the amount of capital to be employed, nor any provision as to when or how contributions shall be made, other than the one quoted in the majority opinion. It is clear the

partners knew Kemper, the appellant, was to be absent a part of the time, during which Miller, the respondent, was authorized to advance money for the benefit of the business, with the agreement, if he did so out of his private funds, he should be reimbursed therefor, with interest at six per cent. There can be no reasonable and natural understanding of the contract other than that permitting Miller to recover from Kemper whatever amount he advanced, with interest, for Kemper's benefit, keeping in mind the equality of their relations to the partnership business. Any other construction of the contract would impose upon respondent a greater risk than he assumed in the agreement that the partners were to share equally in the losses. Indeed, all the parties so understood it, because the complaint specifically alleges, "that about May 4, 1912, a settlement was had between the partners and a balance struck." Immediately the complaint then sets out the total amount invested in the business, the amount paid in by each, that the amount furnished by each of the others is less than one-third of the total, and that respondent's overpayment was to the advantage of appellant in the sum of $399.91, for which judgment was demanded. Appellant's demurrer admits this. There is no necessity to invoke the liberality enjoined by Rem. Code, § 285, in the construction of pleadings, to observe that the effect of the allegations of the whole complaint (notwithstanding some portions thereof in the nature of conclusions or surplusage that were not moved against by appellant) is to recover for an oversubscription to the capital of the partnership made by respondent for appellant's benefit, according to the terms of the covenants in the contract, due upon a settlement between the parties and a balance struck. In such case the rule, admitted in the majority opinion, is:

"An action may be brought on a note or other obligation, given by one partner to another for a valid consideration, although the transaction may inure to the benefit of the firm, . . ." 30 Cyc. 467.

Story on Partnership (7th ed.), page 345, § 219, states the rule to be as follows:

"It is true that one partner may maintain an action at law against the other partners or any one or more of them, for moneys advanced or paid or contributed at their request, for their separate and distinct account and benefit."

Vol. 2, Bates, Partnership, § 878, says:

"The real test is not solely whether the action can be tried without going into the partnership accounts, but whether the defendant has bound himself personally to the plaintiff."

Among other authorities to the same effect are *Ryder v. Wilcox*, 103 Mass. 24; *Benton v. Hunter*, 119 Ga. 381, 46 S. E. 414; *Wright v. Michie*, 6 Gratt. (Va.) 354; *Carpenter v. Greenop*, 74 Mich. 664, 42 N. W. 276, 16 Am. St. 662, 4 L. R. A. 241; *Bates v. Lane*, 62 Mich. 132, 28 N. W. 753; and *Mitchell v. Wells*, 54 Mich. 127, 19 N. W. 777.

An action of this kind in no sense disturbs the rights of creditors with reference to the partnership assets or its liabilities, or the liabilities of the partners.

The judgment of the lower court should be affirmed.

[No. 15215. Department One. May 31, 1919.]

W. E. DAVIS, *Respondent,* v. P. P. PENDRASS, *Appellant.*[1]

LANDLORD AND TENANT (127)—UNLAWFUL DETAINER—EXISTENCE OF RELATION. Plaintiff was entitled to prosecute an action of unlawful detainer where on denial of the relation of landlord and tenant, the court found, on conflicting evidence, that defendant was in possession as plaintiff's tenant.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered January 5, 1918, upon findings in favor of the plaintiff, in an action of unlawful detainer, tried to the court. Affirmed.

Henry Conger and *E. N. Eisenhower,* for appellant.

J. H. Gordon, for respondent.

MACKINTOSH, J.—Respondent is seeking to recover possession of a twenty-acre tract of land in this action of unlawful detainer, and is asking judgment for rent which it is alleged is in arrears. The complaint states that the respondent is the owner of the land in question, and that, in April, 1917, he rented the land to appellant at a monthly rental, in the payment of which the defendant has defaulted. The appellant, in his answer, affirmatively alleges that he is in possession of the tract in question, not as tenant of the respondent, but by virtue of a contract of purchase made by the respondent's predecessor in interest.

As stated by the appellant, this question resolves itself into one of fact, namely, Did the relationship of landlord and tenant exist between the parties to this action? Thus the appellant contends that at all times he was in possession of the land under the original contract of purchase, which had never been cancelled

[1]Reported in 181 Pac. 682.

by either of the original contractors or by the respondent, and that, therefore, the appellant had never become respondent's tenant.

It is unnecessary to review the testimony upon this issue, which testimony is in sharp conflict, the reading of which, however, has convinced us that the trial court was correct in arriving at the conclusion that the appellant was in possession of the land as respondent's tenant, and therefore the respondent was entitled to prosecute his action, and the judgment in his favor was correct and is hereby affirmed.

CHADWICK, C. J., MAIN, TOLMAN, and MITCHELL, JJ., concur.

[No. 15231. Department One. May 31, 1919.]

WILBUR H. APPLETON, *Appellant*, v. ADELAIDE APPLETON, *Respondent*.[1]

DIVORCE (9) — DESERTION — RECONCILIATION — GOOD FAITH — EVIDENCE—SUFFICIENCY. In a husband's action for divorce, after decree for separate maintenance for his fault, his mere word is not sufficient to sustain the burden of proof that his offer to resume relations was made in good faith and not for the purpose of laying a foundation for his divorce action, where there was direct conflict in the testimony.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered January 31, 1918, upon findings in favor of the defendant, in an action for divorce, tried to the court. Affirmed.

Robertson & Miller and *Rosenhaupt & Grant*, for appellant.

Merritt, Lantry & Merritt, for respondent.

PER CURIAM.—This action follows *Appleton v. Appleton*, 97 Wash. 199, 166 Pac. 61.

[1]Reported in 181 Pac. 861.

Plaintiff began this action for divorce, alleging defendant's repudiation of a *bona fide* attempt to reconcile their differences and to live together as husband and wife. The court found as a fact that the efforts and offer of the plaintiff were not in good faith, and denied a divorce.

The question of good faith is a question of fact. We have read the record, and, having in mind that, in the former action, the plaintiff's prayer for a divorce was denied; that the defendant was given a decree of separate maintenance, thus establishing that the fault up to that time was in plaintiff; that the burden of proof is upon plaintiff to establish that his offer to resume marital relations with his wife was made in good faith with an honest intention that it should be accepted, and with the further honest intention of fulfilling his marital duties, and not for the purpose of laying a foundation for a future suit for divorce, we cannot say that plaintiff has sustained the burden. The evidence is practically one against the other, and in view of the decree in the preceding case and the finding of the trial judge, who had both parties before him and could measure their conduct and attitude when upon the witness stand, and in view of the fact that the offer was made within two weeks after the decree in the former case while the smart of the former trial was still burning and was possibly a matter of public comment and gossip, it would seem that defendant would have the right to require some evidence of good intention other than the mere word of plaintiff.

It would serve no end to rehearse the testimony in detail. It is enough to say that it is our judgment plaintiff has not sustained the burden of proof that the law puts upon him.

Affirmed.

[No. 15242. Department One. May 31, 1919.]

THE STATE OF WASHINGTON, *on the Relation of George Dysart et al., Respondents,* v. BERTHA S. GAGE, *as Auditor of Lewis County, Appellant.*[1]

SCHOOLS AND SCHOOL DISTRICTS (25-1)—POWERS OF BOARD—EMPLOYMENT OF COUNSEL. Rem. Code, § 4423, granting broad corporate powers to school districts, includes the right to employ special counsel, where the prosecuting attorney could not properly represent antagonistic interests of the several districts involved and urgent necessity existed for special assistance; notwithstanding Rem. Code, § 116, makes the prosecuting attorney the legal adviser of all school districts.

Appeal from a judgment of the superior court for Lewis county, Reynolds, J., entered November 7, 1918, in favor of the plaintiff, upon overruling a demurrer to the complaint, in an action to compel the issuance of salary warrants for legal services rendered a school district. Affirmed.

Herman Allen and *J. H. Jahnke,* for appellant.

A. A. Hull, for respondents.

MACKINTOSH, J.—The relators ask for a writ of mandate to compel the auditor of Lewis county to issue warrants to them in compensation for legal services performed for school district No. 78, of Lewis county, these services having been rendered at the request of the directors of that district. School districts numbers 35, 57 and 78, acting upon the advice of the prosecuting attorney of the county, attempted to form a consolidated district, as provided by law, and, in pursuance of that advice, held an election to vote upon that consolidation and attempted to bond the consolidated district, and, still in compliance with the

[1]Reported in 181 Pac. 855.

advice of the prosecuting attorney, built a schoolhouse, which was situated in district No. 78, and incurred an indebtedness therefor of approximately $10,000. When the bonds had been voted upon and the schoolhouse had been nearly completed, the officers of the consolidated district were advised that the bonds were illegal, and that the purported consolidated district had been illegally formed. Thereafter the directors of school district No. 78 consulted with the relators, and upon the advice of the prosecuting attorney, employed the relators to protect the rights of the district and to straighten out its affairs. Pursuant to that employment, the relators commenced actions which resulted in the restraining of the officers of the purported consolidated district from any further functions, and rendered such further legal services as to result in the taking over of the school house by district No. 78, and validating the indebtedness of that district. Further legal services were rendered which resulted in unraveling the tangle in which the district affairs had become involved. The directors of the school district approved of the bill rendered by the relators for their services and requested the appellant, as auditor of Lewis county, to sign and register the warrants drawn in payment of such services. The appellant refused to comply with that request.

This action having been commenced, the appellant demurred to the complaint, and the demurrer having been overruled, brings this appeal.

The appellant asserts her refusal to sign and register the warrants to be based upon the fact that Rem. Code, § 116, provides:

"The prosecuting attorney of each county shall have authority and it shall be his duty, subject to the supervisory control and direction of the attorney general, to appear for and represent the state and the

county and all school districts in the county in which he is a prosecuting attorney, in all criminal and civil actions and proceedings in such county in which the state or such county or such school district is a party"

and that, under this section, directors of school districts are not authorized to employ counsel, but must rely upon the services of the prosecuting attorney of the county; and claims that this case is not to be distinguished from the case of *State ex rel. State Board of Medical Examiners v. Clausen,* 84 Wash. 279, 146 Pac. 630, where we held that the state board of medical examiners had no authority to employ special counsel to prosecute violations of the statute relating to the practice of medicine.

It would seem that the power of the state board of medical examiners and the power of directors of school districts to employ counsel are not of a parity. The state board of medical examiners is not a municipal corporation, but is a board in the nature of a state office, and the act creating it gave it no authority greater than that possessed by all state officers, who must look to the *Attorney General* as their legal adviser. Moreover, in the case of *State ex rel. State Board of Medical Examiners v. Clausen,* above, the state board of medical examiners was shown to be endeavoring to employ private counsel to prosecute criminally those whom the board claimed were violating the criminal statutes. This it could not do, for the prosecution of criminal actions has been placed in the hands of the *Attorney General* and the various prosecuting attorneys of the state. The act which creates school districts constitutes them municipal corporations. Title 3, chapter 2, article 2, section 2, chapter 97, Laws of 1909, p. 265, provides:

"A school district shall constitute a body corporate and shall possess all the usual powers of a corporation

for public purposes, and in that name and style may sue and be sued, purchase, hold and sell such personal and real estate, and enter into such obligations as are authorized by law; and the title to all school buildings or other property, real or personal, owned by any such school district shall, upon the organization of a district under the provisions of this act, vest immediately in the new district, and the board of directors of such school district shall have exclusive control of the same for all purposes herein contemplated." Rem. Code, § 4423.

This is a delegation of broad corporate powers and must include the right to employ special counsel when, as here, the prosecuting attorney cannot act and the necessity for legal aid is urgent. The statute heretofore referred to regarding the prosecuting attorneys is merely a definition of their powers, and does not attempt to restrain, modify, or define the powers of boards of school directors.

In the case at bar, a recital of the facts demonstrates that the prosecuting attorney advised the board of school directors of district No. 78 to employ the relators, and it is apparent that the proper attention to the affairs of the district demanded that counsel be procured to represent it, and the prosecuting attorney, being the adviser of all the school districts, could not, in the nature of things, properly represent the interests of this district when they had become antagonistic to the interests of the two other districts with which a consolidation had been attempted. An urgent necessity existed for procuring special assistance, and it was only in meeting this necessity and upon the advice of the prosecuting attorney that the relators were employed. Under such circumstances, the board of school directors had authority to enter into the contract of employment and the relators are entitled to their compensation, which, it is admitted,

is in a reasonable sum. The reasoning in the case of *Wiley v. Seattle*, 7 Wash. 576, 35 Pac. 415, 38 Am. St. 905, and *Reed v. Gormley*, 47 Wash. 355, 91 Pac. 1093, would seem to confirm our position in this case.

The judgment of the lower court is affirmed.

MITCHELL, MAIN, FULLERTON, and TOLMAN, JJ., concur.

[No. 15246. Department One. May 31, 1919.]

ISRAEL G. HARLAN, *Appellant*, v. MARCUS L. McGRAW *et al.*, *Respondents*.[1]

MINES AND MINERALS (17)—COAL LANDS—LEASE—FORFEITURE—WAIVER. A coal mine lease, calling for payment of royalties on all coal mined and giving the lessor the right of oversight and inspection of operations, cannot be forfeited for waste in using coal for ballast, if the lessor permitted the lessee to mine coal for ballast and exclude the same from the royalty account; at least, not until specific demand had been refused.

SAME (17)—COAL LANDS—LEASE—BREACH. Where a coal mine lease pledged the property as security for the payment of rental, the filing of labor liens against the property is not such a breach as would warrant forfeiture of the lease, especially where the liens have been fully paid.

EQUITY (19) — MINES AND MINERALS (17) — FORFEITURES — COAL MINE LEASE. While equity may forfeit a coal mine lease for default in the payment of a few month's royalties, it will leave the lessor to his remedy at law, where the amount involved was small, the lease had a long time to run, valuable improvements had been made, and the default was due to a mistake in the lessee's construction of the contract.

Appeal from a judgment of the superior court for Lewis county, Reynolds, J., entered September 13, 1918, upon granting a nonsuit, dismissing an action to cancel a lease, tried to the court. Affirmed.

[1]Reported in 181 Pac. 882.

C. D. Cunningham, for appellant.

Ralph A. Coan and *Miller & Wilkinson,* for respondents.

TOLMAN, J.—Appellant, on the 19th day of September, 1916, being then the owner of the real property therein described, made a written lease of certain coal lands to the respondent Marcus L. McGraw, who afterwards assigned his rights thereunder to the Centralia Coal Mining Company, a corporation. The provisions of the lease, so far as they are material to the issues here to be determined, are as follows:

"The party of the second part shall pay, and he does hereby agree to pay to the party of the first part as rental for said land and as minimum royalty on coal mined therefrom, one thousand dollars per year to cover the first ten thousand tons mined or less, said one thousand dollars to be paid at the rate of one hundred dollars per month on the 10th day of each and every month, beginning with the 10th day of October, 1916, and continuing on the 10th day of each and every month thereafter during the term of this lease, save and except that during the months of June and July of each year, said payment shall be discontinued; and for all coal mined in excess of the first ten thousand tons per year, the party of the second part agrees to pay ten cents per ton of two thousand pounds, mine run coal, taken from said lands, on the 10th day of each and every month, said royalty to be payable at the Field & Lease Bank, Centralia, Lewis county, Washington, in United States Gold Coin; it being the intention of the parties hereto that there shall be a settlement once every month between the parties for the purpose of determining the amount of coal mined in the previous month, and that if said settlement shall show that more than one thousand tons of coal have been mined in the previous month, then the party of the second part shall pay to the party of the first part the sum of ten cents per ton for all

coal mined in excess of one thousand tons, this to continue during every month covered by this lease, save and except the months of June and July of every year, in which months the party of the second part shall only be required to pay ten cents per ton for all coal actually mined during said months. . . .

"It is further stipulated and agreed as part consideration of this lease, that the party of the first part shall have a lien on all machinery, equipments, cars, buildings and other property erected and to be erected on said lands, or in the mine or mines, made by the party of the second part, for any money due the party of the first part, under this lease, which said lien shall be a prior claim to all other liens, including labor liens, and the party of the second part hereby pledges to the first party all such property of whatever kind and description belonging to him or hereinafter acquired by him, his successors or assigns, that may be placed on said land during this lease, or placed in said mine or mines in connection therewith, to secure any money becoming due, and the said party of the second part shall have the right to remove said machinery and equipment and buildings only after such money has been paid. . . .

"It is further stipulated and agreed that in respect to the several provisions herein, referring to the performance of acts within certain named period of time, time being of the essence of this contract, and in case of the failure of the party of the second part to pay in full any year's rental under this lease at the time herein specified, or to pay any taxes or assessments before the same become delinquent, or in any way fail to fulfill the terms of the lease, then this lease may be forfeited and terminated at the option of the party of the first part."

Appellant, in his complaint, alleges that, under this lease, the lessee became obligated to pay as royalty at least $100 on or before the 10th day of each and every month, except the months of July and August in each year, and in addition thereto, the sum of ten cents per ton for all coal mined over and above one

thousand tons in any such month; and further alleged that the defendants, and each of them, had defaulted and breached the covenants of the lease, in that they had failed and refused to pay each of the $100 monthly payments which became due on the 10th day of January, 1918, the 10th day of February, 1918, the 10th day of March, 1918, the 10th day of April, 1918, and the 10th day of May, 1918; the complaint also alleges a further breach, in that the defendants suffered and permitted liens for labor to be filed against the mine and appellant's property and interest therein of upwards of $4,000, and that although due demand had been made, they had wholly failed to satisfy and discharge said liens, and the same were and are an encumbrance and lien upon the appellant's property. The prayer of the complaint is for judgment cancelling and annulling the lease and excluding the defendants, and each of them, and all persons claiming, or to claim, by, through, or under them, or any of them, from the property, and enjoining them from claiming or asserting any right, title or interest therein. In due time respondents answered to the complaint, alleging that all sums due for rental provided for in the lease had been fully paid, and no amount whatever was due the plaintiff on account thereof; and further, admitting that certain liens had been filed, but alleging that the lien claimants had been fully paid, and that no such liens had been filed on or against the property of the plaintiff. Upon these issues the case was called for trial, and at that time counsel for appellant moved the court for leave to amend the complaint by alleging the following as an additional ground for forfeiture:

"That at all times since the lease in question was executed, the defendants have operated a coal mine upon the lands and premises described in the lease and

in this complaint. That by the terms of the lease it is provided that payments for royalty upon the coal shall be made at ten cents per ton, mine run. That, as a matter of fact, at all times since this lease was executed down until the time of the commencement of this action, while the defendant was operating the mine, it committed great waste in this: That of the coal which was extracted from the ground they hauled out and scattered around the mine and used as ballast upon a railroad track about 7,000 tons, which was never accounted for to the plaintiff by the defendant; that by reason of the fact that this coal has been scattered about it is impossible to ascertain the amount of it or to determine the amount of royalties that are earned under the lease for such coal as has been wasted and dissipated. That although frequent demands have been made for the amount and use of scales in weighing of all coal, the defendants failed and refused to do so, and by reason of their waste they have forfeited all rights in and to said lands and premises."

Respondents objected to the amendment, first, upon the ground that it came too late, the case being then ready for trial, and that the proposed amendment would raise new issues involving considerable time and labor upon their part to meet such issues; and also objected upon the further ground that, accepting the statement of counsel as embodied in the offer to amend as true, the facts stated made no ground for forfeiture of the lease. Counsel for appellant offered to allow additional time to meet the proposed issue, and respondents still objecting, the trial court refused to allow the amendment, and directed that the trial proceed upon the issues as framed. Thereupon it was stipulated that, prior to the commencement of this action, workmen employed in and about the mine filed liens for labor upon all of the machinery and equipment of the mine, but asserted no lien against the land; that subsequently an action was brought and judgment rendered against the Centralia Coal Mining Company

for a sum aggregating approximately $3,000, based upon such labor liens, and that thereafter the defendants paid such judgment in full and satisfied the record. It was further stipulated that the last coal mined under the lease was on January 28, 1918, no coal being mined subsequent to that date; that, on February 28, 1918, the defendants paid to the plaintiff the sum of $324.13, which covered the balance of the royalty of ten cents per ton for all coal actually mined up to that time; and that, on the 10th day of May, 1918, defendants paid to the plaintiff the further sum of $54.95, which, together with the royalties theretofore paid for coal actually mined at ten cents per ton, made up the full sum of $1,000 paid as rental after the 19th day of September, 1917. It was further stipulated that, the day before this action was commenced, plaintiff went to the Field & Lease Bank at Centralia, Lewis county, Washington, and there demanded payment of the sum of $100 per month, minimum royalty for the months of February, March, and April, 1918, and that there was no money there with which to meet said demand, and said minimum royalty was not paid. It was still further stipulated that, after the commencement of this action, and on August 10, 1918, and again on September 10, 1918, defendants deposited in the Field & Lease Bank at Centralia the sum of $100 to cover the minimum payments provided in the lease for the months of August and September, but that plaintiff had refused to accept the money so deposited. Neither party offered any other testimony, and the trial court, holding that no ground for forfeiture had been established, entered a judgment of dismissal, from which this appeal is prosecuted.

It will be observed, and must be constantly borne in mind, that appellant is seeking only the forfeiture and

cancellation of the lease, and does not in this action seek to enforce any rights which he may have other than the right of forfeiture. This being so, it seems manifest that the trial court did not err in denying leave to amend the complaint. The lease, in addition to the provisions quoted, gave the appellant the right of oversight and inspection of operations, in order to enable him to know at all times the amount of coal being mined, and if he permitted the respondents to mine and use coal for ballast and to exclude the material so used from the royalty account, he should not be permitted to claim a forfeiture by reason thereof; at any rate until such time as he had made a specific demand and his demand had been refused.

Nor can we hold that the filing of labor liens upon the property of the lessee, which was, by the terms of the lease, first specifically pledged as security for the payment of the rental, was such a breach as would warrant a forfeiture; especially when, as here, the liens have been fully paid. We find no covenant in the lease that the property of the lessee will be kept clear from subsequent labor liens, nor any agreement that a failure to so do will work a forfeiture.

While that portion of the lease which provides for the payment of rental and royalty must, we think, be construed as appellant contends, and effect be given to the language used providing for monthly settlements and the payment of royalty each month on all coal mined in excess of 1,000 tons in the preceding month; yet, as equity abhors a forfeiture, and as this action was brought for no other purpose, it does not follow that, because the parties differ in their construction of the terms of the lease, the mistaken party will be penalized to the extent of enforcing a forfeiture against him. It is suggested in respondents' brief that the

parties hereto had, until shortly before the institution of this suit, themselves, by their act, placed a construction upon the contract in harmony with respondents' contentions. But neither in the pleadings nor the stipulated facts does that appear, except as it may be inferred from the fact that an attempt to forfeit was not sooner made, and by the acceptance of the payment of $54.95 made on the 10th day of May, 1918. Appellant asks for no judgment except that of forfeiture; and in view of the length of the term created by the lease, the probable value of the improvements as contemplated by the terms of the lease, the comparatively small amount which has been withheld from appellant, and the stipulated fact that he demanded that sum but one day before the bringing of this suit, we think the rule laid down by this court in *Walker v. McMurchie,* 61 Wash. 489, 112 Pac. 500, must be followed. It is there said:

"Equity has ever been jealous of the right of forfeiture, and has never enforced it unless the right thereto has been so clear and insistent as to permit of no denial."

The general rule appears to be well stated by the supreme court of Illinois in *Tarr v. Stearman,* 264 Ill. 110, 105 N. E. 957, where it is said:

"Courts of equity, as well as courts of law, recognize the rights of the parties to a contract to stipulate for penalties and forfeitures, but it is a rule of universal application that courts of equity will never affirmatively enforce either a penalty or a forfeiture. (2 Story's Eq. Jur.—13th ed.—sec. 1319; 16 Cyc. 80.) It is a well settled and familiar doctrine that a court of equity will not interfere on behalf of the party entitled thereto and enforce a forfeiture, but will leave him to his legal remedies, if any, even though the case might be one in which no equitable relief would be given to the defaulting party against the forfeiture. The few

apparent exceptions to this doctrine are not real exceptions. In fact, there are no exceptions. Those which appear to be so all depend upon other rules and principles."

See, also, 16 Cyc. 80, and cases there cited. There being no suggestion of the insolvency of respondents, or either of them, or allegation that such remedy is inadequate, appellant will be left to pursue his remedy at law until such time as it shall appear that the legal remedy is inadequate.

Judgment affirmed.

CHADWICK, C. J., MITCHELL, MAIN, and MACKINTOSH, JJ., concur.

[No. 15279. Department One. May 31, 1919.]

THE STATE OF WASHINGTON, *on the Relation of J. J. Baeder, Plaintiff*, v. BRUCE BLAKE, *Judge of the Superior Court for Spokane County, Respondent.*[1]

ABATEMENT AND REVIVAL (19)—DEATH OF PARTY—CAUSES SURVIVING. Rem. Code, § 193, providing that no action shall abate by the death of a party if the cause of action survives, does not provide what causes of action survive.

SAME (19). Rem. Code, § 967, providing that all other causes of action [than those enumerated in § 183] survive to the personal representatives, relates only to causes of which the law already provided should survive at common law.

SAME (19). Rem. Code, § 191, providing that assignees by assignment in writing may maintain an action in their own names, does not define what causes of action are assignable, and does not refer to the survival of actions.

SAME (21)—DEATH OF PARTY—ACTIONS THAT ABATE. At common law, and in this state in the absence of statute, a right of action for damages for deceit and conspiracy in a stock subscription transaction abates upon the death of the defendant, where the estate of the deceased was not enriched by the fraud.

[1]Reported in 181 Pac. 685.

Certiorari to review an order of the superior court for Spokane county, Blake, J., entered January 31, 1919, abating an action as against the estate of an intestate. Affirmed.

F. W. Girand and *Fred M. Williams,* for relator.

Burcham & Blair, for respondent.

Main, J.—The purpose of this action was to recover damages for fraud and deceit. After the issues were framed, one of the defendants, John F. Green, died. Upon application of the plaintiff, the administratrix of the deceased's estate was substituted as a party defendant. Thereafter, the administratrix moved the court to vacate the order of substitution and enter an order abating the action as against the estate of the intestate. After a hearing upon the matter, the court entered the order of abatement as prayed for. The cause is here to review this order or judgment.

A brief statement of the facts is sufficient to an understanding of the question presented.

The complaint charges a conspiracy to defraud, arising out of these facts. Certain of the defendants, not including the intestate, caused a corporation, known as the Spokane-Stanford Land Company, to be organized under the laws of the state of Washington. After this corporation was organized, there was assigned to it an option for the purchase of a large tract of land in Santa Clara county, California. The parties promoting the corporation contemplated platting the property referred to into smaller tracts and marketing the same, hoping thereby to make a profit on the transaction. The capital stock of the company was of the par value of $100 per share. John F. Green, during his lifetime, subscribed for a certain number of shares, agreeing to pay, according to the subscription

contract, the par value thereof; but by arrangement with the promoters of the corporation, paid only $60 per share. This was his part of the alleged fraudulent transaction, and, by reason of this fact, it is now sought to hold his estate liable at the suit of a stockholder who paid par value for his stock. The venture was unsuccessful, and the parties investing in the stock did not realize anything upon the enterprise, but sustained a loss.

The question presented for determination is whether the action against Green would survive against his estate.

Consideration will first be given to the statutes of this state, upon which reliance seems to be placed. Section 193, Rem. Code, provides, among other things, that no action shall abate by the death of a party if the cause of action survive or continue. This statute does nothing more than provide that, if the cause of action survive, then an action which may be pending does not abate by the death of the party. It does not define, or attempt to define, what causes of action survive. Section 967, Rem. Code, provides:

"All other causes of action [than those enumerated in section 183, *supra*] by one person against another, whether arising on contract or otherwise, survive to the personal representatives of the former and against the personal representatives of the latter. Where the cause of action survives, as herein provided, the executors or administrators may maintain an action at law thereon against the party against whom the cause of action accrued, or after his death, against his personal representatives."

This statute has been construed as referring only to causes of action which had already survived, and that it did not attempt to announce what causes of action would survive. *Slauson v. Schwabacher Bros. & Co.,*

4 Wash. 783, 31 Pac. 329, 31 Am. St. 348; *Jones v. Miller*, 35 Wash. 499, 77 Pac. 811.

In the case last cited, it was said, referring to a previous decision (the *Slauson* case):

"There we said that the legislature, when it enacted this section, was legislating with reference to causes of action which had already survived, and was not attempting to announce what causes of action should survive; and, further, that if the contrary contention were correct, there was no limit whatever to causes which would survive the death of the person injured; 'for causes of action for assault, slander, and for other purely personal causes, would survive; and this would be so wide a departure from the established rule that the legislature would hardly be deemed to have intended it without plainly expressing such intention.' That this is the correct construction of the statute is made clear by reading it in connection with the act of which it formed a part when originally enacted, and being so, it does not warrant the holding that causes of action, such as the one at bar, survive to heirs and personal representatives."

Section 191, Rem. Code, provides that:

"Any assignee or assignees of any judgment bond, specialty, book account, or other chose in action, for the payment of money,"

by assignment in writing, signed by the person authorized to make the same, may, by virtue of such assignment, maintain an action in his own name against the "obligor or obligors, debtor or debtors" therein named.

This statute is not applicable, for two reasons: First, it does not purport to define what causes of action are assignable, but refers to causes of action which were assignable by other provisions of the law, either common or statute. The statute is less susceptible to the construction that it provides what causes of action may be assignable than was § 967 to the con-

struction that it provided what causes of action were survivable. The latter statute has been construed as above indicated. Second, the statute is not applicable because it does not refer, and does not purport to refer, to the survival of causes of action, but only to assignment. It may be true that, at common law, the conditions which would make an action assignable would likewise make it survivable; but it would not follow from this that a statute which deals only with assignment of causes of action could be broadened so as to include survival of causes of action. It thus appears that this action does not survive by virtue of any statutory provision enacted by the legislature of this state.

The question then arises whether it survives by virtue of the common law. It may be admitted, for the purposes of this opinion, that the common law of this state includes the statutes of 4 Edward III, and 3 and 4 William IV, which modified the old common law of England. The statute first mentioned has no application here. The second statute provided that an action could be maintained against the executors or administrators of a person deceased for any wrong committed by him in his lifetime to another in respect to his property, real or personal. Statutes, alike in terms or substance, have been enacted in a number of states in this country. The courts of England and the courts of the various states where like or similar statutes exist have uniformly construed them as applying only to damages done to some specific real or personal estate of which one may be the owner, and that they do not apply to a mere fraud or cheat by which one sustains a pecuniary loss, as this is not damage done to a personal estate. *Phillips v. Homfray*, 24 L. R. (1883), Ch. Div. 439; *Peek v. Gurney*, 6 L. R. (1873), Eng. and Irish App. 377; *Leggate v. Moulton*, 115 Mass. 552; *John V. Far-*

well Co. v. Wolf, 96 Wis. 10, 70 N. W. 289, 71 N. W. 109, 65 Am. St. 22, 37 L. R. A. 138; *Stebbins v. Dean,* 82 Mich. 385, 46 N. W. 778.

Without assembling the cases, it may be said the decisions in a number of other states are of like import. No case has been cited where a different construction of the statute has been adopted. Our attention has been called to a number of decisions from this court, as well as from others, where it has been held that a cause of action survived and could be prosecuted against the administrator or executor of the deceased. An examination of the opinion in each of these cases discloses that in none of them was the action a pure action in tort for unliquidated damages, as here. Each of the cases cited and relied on falls within one of the well recognized classes of survivorship, such as where a tort may be waived and the suit brought in quasi contract; where a right of rescission exists; where specific property passed to the deceased upon a trust; where the action is one of recognized equity jurisdiction, or where the estate of the deceased has been directly enriched by the fraud complained of. The present action falls within none of the classes where survival exists.

The judgment will be affirmed.

CHADWICK, C. J., MITCHELL, MACKINTOSH, and TOLMAN, JJ., concur.

[No. 15304. Department One. May 31, 1919.]

RALPH LESTER, *Respondent*, v. ALEX. MILLMAN *et al.*, *Appellants*.[1]

MALICIOUS PROSECUTION (3, 17-1)—PROBABLE CAUSE—ADVICE OF ATTORNEY—QUESTION FOR JURY. In an action for malicious prosecution, whether defendant made a full and fair statement of facts to the prosecuting attorney, is a question for the jury, where it appears that his criminal prosecution of plaintiff for larceny rested largely upon automobile tracks leading between their homes, alleged to have made at 2 a. m.; and, according to plaintiff's testimony, when charged with the theft he offered to show defendant that such tracks must have been made before 11:30 p. m., since they were crossed by a motorcycle at that time; the defendant not having disclosed such fact to the prosecutor.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered December 7, 1918, upon the verdict of a jury rendered in favor of the plaintiff, in an action for malicious prosecution. Affirmed.

W. A. Johnson, for appellants.

O. S. Galbreath, for respondent.

MITCHELL, J.—This action was brought by Ralph Lester, respondent, against Alex. Millman and Mary Millman, husband and wife, appellants, to recover damages for malicious prosecution. The jury returned a verdict against appellants in the sum of $250, upon which verdict a judgment was rendered, after a motion for a new trial was denied. Appeal has been taken from the judgment.

The only assignment of error is the denial by the trial court of appellants' motion for a directed verdict at the conclusion of all the testimony. The motion was based upon the contention that the evidence showed

[1]Reported in 181 Pac. 878.

appellants had acted upon the advice of a deputy prosecuting attorney, after making a full and truthful statement of all known facts relating to probable cause for the prosecution.

The rule stated in *Simmons v. Gardner*, 46 Wash. 282, 89 Pac. 887, L. R. A. 1915 D 16, followed in the cases of *Anderson v. Seattle Lighting Co.*, 71 Wash. 155, 127 Pac. 1108; *Hightower v. Union Sav. & Trust Co.*, 88 Wash. 179, 152 Pac. 1015, Ann. Cas. 1918 A 489; *Main v. Healy*, 100 Wash. 253, 170 Pac. 570; *Borg v. Bringhurst*, 105 Wash. 521, 178 Pac. 450; and *Bruce v. Elmergreen*, 106 Wash. 359, 180 Pac. 135 (quoting from the syllabus in the first case), is as follows:

"In an action for malicious prosecution, where it appears from the undisputed evidence that the prosecutors acted upon the advice of the prosecuting attorney after making a full and truthful statement of all known facts relating to probable cause for the prosecution, it becomes the duty of the court to find probable cause as a matter of law, and to direct a verdict for the defendants; . . ."

Considered from another viewpoint, the cases of *Finigan v. Sullivan*, 65 Wash. 625, 118 Pac. 888, and *Baer v. Chambers*, 67 Wash. 357, 121 Pac. 843, Ann. Cas. 1913 D 559, and authorities therein cited, in effect declare that, in an action for malicious prosecution, where there is evidence warranting the jury in concluding that the defendant did not fully and truthfully communicate to the prosecuting attorney all the material facts within his knowledge bearing upon plaintiff's guilt of the crime for which he was prosecuted, then the court cannot decide as a matter of law, that defendant was justified by the advice of the prosecuting attorney, but the question of probable cause is one for the jury.

In the present case, the parties were, and for about

ten years had been, neighbors. They lived in the country some distance from Tacoma. The alleged criminal act consisted of breaking into the cellar at the Millman home and carrying away personal property belonging to them, about two o'clock in the morning of June 9, 1918. At that time there were with respondent, at his parents' home, a brother, Dave Lester, Mrs. Dave Lester, and a sister, Miss Lester. On the evening of the 8th of June, respondent visited with the neighborhood merchant and family from eight o'clock until about eleven o'clock, when he returned home in his automobile. This is corroborated by the merchant. Respondent testified he retired about 11:30, without having been near the Millman place. On that same evening, Miss Lester was taken from her home about eight o'clock by a friend, on a motorcycle, to a theater in Tacoma. Returning, they left the show about eleven o'clock, and arrived at her home about 11:30 o'clock. Mrs. Millman testified she was certain she retired at one o'clock the night of June 8th, laid awake quite a while, and about two o'clock, upon being disturbed, she looked out the window and saw respondent, whom she recognized, and another person, taking the property out of the cellar under an outbuilding about forty feet away. Mr. Millman worked at a sawmill at night, and on his returning home about 6:15 a. m., June 9th, his wife told him of the larceny. He testified he immediately went out to the cellar and noticed footprints which he followed out to automobile tracks which led to the Lester home. He went to the barn where respondent and his brother Dave were, called respondent out, and accused him of the theft. Upon denial by respondent, Millman took out his watch, noticed the time, and said: "I will give you one hour's time to bring that back." His account of what then occurred, as testified to in the present trial, was:

"I went home, changed my clothes, had breakfast, came back about two hours later, saw him again; I said, 'You haven't brought the goods back.' He said, 'No.' He wanted me to search his place. Might as well search for a needle in haystack; good many brushes and buildings around there. He says, 'Come in, I will show you the tracks which way I came in last night.' I didn't want to listen to that, because I already had positive proof; I didn't want any more of it. I said, 'I will miss my car.' He said, 'I will take you to the car with my machine.' I said, 'No, my friendship ceases with a man doing dirty trick like that.' "

He further testified that he then called at the prosecuting attorney's office and related to one of the deputies Mrs. Millman's story, his finding and following the footprints and automobile tracks, and the two interviews with respondent, took the deputy prosecuting attorney's advice, made a criminal complaint, and had respondent arrested for larceny. At the giving of the testimony of Millman, as above set out, the deputy prosecuting attorney was present, and, when called into the witness chair, he testified that Millman's testimony was substantially the same as he had represented the facts upon which he advised the prosecution of respondent; but on cross and redirect examination, he stated the information he received prior to the arrest was Mrs. Millman's having seen and recognized respondent at the time of the theft, and Mr. Millman's having seen and followed the footprints and automobile tracks up to respondent's home.

On the contrary, respondent's testimony showed there was nothing unusual about his footprints, nor the tracks of his automobile. Between the two interviews on the morning of June 9th, after talking with his sister and learning that she and her escort returned home about 11:30 the night before, and having talked with her escort, who lived near by, respondent ex-

amined the tracks of his automobile, made as he came in the night before, and observed that they were plainly crossed over by the motorcycle. In this connection, it may be mentioned that several witnesses, including the young man who used the motorcycle, testified that, upon an examination made that morning between seven and nine o'clock, it was apparent that the motorcycle, which came in about 11:30 o'clock, was the last vehicle along the road at the Lester home, and, as it ran to the house, crossed all other tracks, including those made by respondent's automobile. So that the conversation which took place between respondent and Millman at the second interview on the 9th of June, as testified to by respondent and corroborated by his brother Dave, was this:

"He said, 'You haven't brought it back?' I said, 'No, sir, I haven't anything to take back; I don't see how I can bring it back.' He said, 'I will have you arrested.' I said, 'All right.' He said, 'You took it, my wife seen you out of the window.' I said, 'That is funny.' I said, 'I was in at eleven.' He said it was around two o'clock when done. In the meantime I had went up and seen Stone; that was the man out with my sister; he took her to a show. Q. He was not present? A. No, sir. Q. Say what he said and what you said. A. I said, 'I came in at eleven o'clock.' He said, 'None of your lies goes here, you know you done it.' I said, 'Millman, if you come out to the road I will show you where I came in my machine; my sister said Stone and her got home half past eleven.' I said, 'Come out to the road, I will show you where his crossed mine.' He said, 'None of your lies.' He said, 'I haven't time to listen to lies.' He went off. I said I would take him to town in my machine if he missed his car."

Relative to the fairness of Mr. Millman in reporting the matter to the deputy prosecuting attorney, he has no excuse, by way of haste or excitement at the time

of detailing the facts, for it was on Saturday he first called, at which time the deputy prosecuting attorney was too busy to talk with him and fixed the following Monday, when the story was told upon which Millman was advised of probable cause to make the criminal complaint. Giving the testimony of Millman and the deputy prosecuting attorney, as to the statements and report made by Millman of the facts upon which he was advised there was reasonable ground for the prosecution of respondent, the strongest consideration in favor of appellants, it is obvious there was ample testimony, which the jury was at liberty to believe, that appellants did not make to the deputy prosecuting attorney a full and truthful statement of all known material facts relating to probable cause for the prosecution, because respondent, corroborated by his brother, testified that, in addition to what Millman said occurred in the second conversation on June 9th, he told Millman that his sister, Miss Lester, had told him that she and her friend had returned home that night at half past eleven, and that if he would go out to the road he would show him where they crossed his automobile tracks. It is manifest such declaration and information by respondent were important. Millman, who was depending in large measure upon the contention that automobile tracks were followed to the Lester home from the scene of a theft at two o'clock that morning, was told by respondent that his sister had told him she and her friend returned at 11:30 the same night, and that if he would go out to the road with him he would show him where they had crossed his automobile tracks. The materiality of that part of respondent's statements, shown by his proof to have been omitted by Millman, is apparent.

The question of whether that material additional information was, or was not, given to Millman, as testi-

fied to by respondent's witnesses, was no concern of the trial judge, who properly determined that, under the rule, he was stripped of all right or necessity to declare probable cause as a matter of law and to direct a verdict.

Judgment affirmed.

MACKINTOSH, TOLMAN, FULLERTON, and MAIN, JJ., concur.

[No. 15328. Department One. May 31, 1919.]

ALICE A. BRENGMAN, *Appellant*, v. KING COUNTY, *Respondent*.[1]

HIGHWAYS (62, 67)—OBSTRUCTIONS—LIGHTS AND BARRIERS—QUESTION FOR JURY. Where an obstruction of a highway existed where a great many automobiles passed at considerable speed, the county was under obligation to so place and protect lights that they would not be liable to be destroyed by passing automobiles; and whether it did so was a question for the jury where lights placed by the county had been twice destroyed a short time preceding plaintiff's injury; and it was error to decide the question as a matter of law.

APPEAL (111)—PRESERVATION OF GROUNDS—OBJECTIONS NOT PRESENTED BELOW. In an action against a county, objections to the sufficiency of the notice of claim not presented below cannot be considered on appeal.

Appeal from a judgment of the superior court for King county, French, J., entered January 20, 1919, upon the verdict of a jury rendered in favor of the defendant by direction of the court, in an action for personal injuries sustained through an obstruction of a highway. Reversed.

Ballinger, Battle, Hulbert & Shorts, for appellant, cited: *Sutton v. Snohomish*, 11 Wash. 24, 39 Pac. 273, 48 Am. St. 847; *Foy v. Winston*, 126 N. C. 381, 35 S. E. 609; *Sutphen v. Hedden*, 67 N. J. L. 324, 51 Atl. 721;

[1]Reported in 181 Pac. 861.

Pray v. Werksman, 80 N. J. L. 561, 79 Atl. 274; *Fox v. Chelsea,* 171 Mass. 297, 50 N. E. 622; *Norwood v. Somerville,* 159 Mass. 105, 33 N. E. 1108; *Shreve v. Ft. Wayne,* 176 Ind. 347, 96 N. E. 7; *Snowden v. Somerset,* 171 N. Y. 99, 63 N. E. 952; *Consolidated Traction Co. v. Scott,* 58 N. J. L. 682, 34 Atl. 1094, 55 Am. St. 620; *Ahlfeldt v. City of Mexico,* 129 Mo. App. 193, 108 S. W. 122; *Godfrey v. New York,* 104 App. Div. 357, 93 N. Y. Supp. 899; *Sauthof v. Granger,* 19 R. I. 606, 35 Atl. 300; *Stockton Automobile Co. v. Confer,* 154 Cal. 402, 97 Pac. 881; *Mayor etc. of Baltimore v. State of Maryland, Use of Hutchinson,* 166 Fed. 641.

Fred C. Brown and *Wm. Parmerlee,* for respondent, cited: *Tagge v. Roslyn,* 51 Wash. 258, 98 Pac. 668; *Welsh v. Lansing,* 111 Mich. 589, 70 N. W. 129; *Carlson v. New York,* 150 App. Div. 264, 134 N. Y. Supp. 661; *Theissen v. Belle Plaine,* 81 Iowa 118, 46 N. W. 854; *McFeeters v. New York,* 102 App. Div. 32, 92 N. Y. Supp. 79; *O'Neil v. Bates,* 20 R. I. 793, 40 Atl. 236.

MACKINTOSH, J.—On August 12, 1917, a portion of the Pacific Highway located in King county, lying between the cities of Seattle and Tacoma, was being repaired by contractors in the employ of the county. At the conclusion of work on that day, a barricade was erected around a section of the road which had been torn up and lights were placed at the north and south ends of the barricade. At about 9 o'clock in the evening, a passing automobile struck the north end of the barricade and destroyed the light which was placed there. A witness, who observed the occurrence, took the lantern from the south end of the barricade and placed it in the same position which had been occupied by the lantern just destroyed, and within an hour or two thereafter the second lantern was destroyed in

the same manner as had been the first. Thereafter, the plaintiff approaching from the north, ran into the barricade, there being no warning of its presence, and received injuries for which he brought this action.

It was admitted that the lights themselves were sufficient as lights had they been properly placed and protected by a sufficient barricade. At the conclusion of the case, the trial court directed the jury to return a verdict for the county.

The obstruction of the highway existing at a point where a great many automobiles pass during both daylight and dark, and at a point where they are permitted to travel at considerable speed, the county was under an obligation to show such lights, protected by a barricade around the place being repaired, as that one approaching could see that a dangerous condition existed. In placing lights upon this barricade it was necessary that they be so placed that automobile drivers would not be liable to destroy them in passing, and the question as to whether the barricade had been so constructed and the lights so placed is a question of fact for the jury, in view of the testimony which disclosed that the lights so placed had been twice destroyed within a short period preceding the plaintiff's injury. The trial court was in error in determining, as a matter of law, that the county had done its full duty, and should have submitted to the jury the question as to whether the placing of the lights, under all the circumstances and conditions testified to, was the giving of a sufficient and proper warning to protect the public upon the highway from possible injury. *Sutton v. Snohomish*, 11 Wash. 24, 39 Pac. 273, 48 Am. St. 847, decides that a question is presented for the jury's determination when it has been shown that barricades constructed "were liable to be thrown down at any

moment by the mere carelessness or thoughtlessness of persons passing along."

Reed v. Spokane, 21 Wash. 218, 57 Pac. 803, approves as correct an instruction submitting to the jury, in a case similar to this, a question as to whether the municipality had originally constructed "sufficient barriers, guards, and beacons or danger lights" to protect any reasonably careful person from danger.

The later case of *Tagge v. Roslyn,* 51 Wash. 258, 98 Pac. 668, relied upon by the respondent, is one in which the lower court was justified in determining, as a matter of law, that the barriers placed around an excavation were sufficient, the court saying: "considering the nature of the excavation and the temporary character of the barriers placed around it, they having been placed there simply to guard the excavation over night, we feel constrained to hold that the court did not err in holding that the barriers were legally sufficient," the barriers having been securely fastened and there being enough light to enable one to see them.

The barricade in the *Sutton* case was for the protection of pedestrians only, and was not subject to the destruction which comes to barricades placed upon the traveled highway over which rapidly moving automobiles are constantly coming and going.

The whole situation here does not point so conclusively to the conclusion that there can be no chance for dispute or argument, and therefore the question should not have been decided by the court as a matter of law, but should have been submitted to the jury as one of fact.

The respondent objects to the suit by reason of some alleged deficiences in the claim presented to the county commissioners. We cannot consider this point for the reason that it was not raised in the lower court and is presented here for the first time.

For the reasons stated, the judgment will be reversed and the cause remanded for a new trial.

CHADWICK, C. J., MAIN, TOLMAN, and MITCHELL, JJ., concur.

[No. 14809. *En Banc.* May 31, 1919.]

G. M. LAURIDSEN, *Respondent,* v. BOWDEN, GAZZAM & ARNOLD, *Appellant.*[1]

APPEAL (386, 387)—REVIEW—WAIVER OF ERROR. The waiver of a motion for new trial does not carry with it and condone whatever errors might have been considered under it, where they were raised and insisted upon under appellant's motion for judgment notwithstanding the verdict.

INSURANCE (10, 12)—AGENTS—RELATION—EVIDENCE. A letter in answer to an inquiry from a local insurance firm, quoting marine insurance rates on a prospective risk and expressing a hope to receive the order, does not constitute the local firm agents with power to cover the risk.

SAME (12, 13)—AGENTS—AUTHORITY. A letter offering to protect a shipment and issue a policy of marine insurance if advised of the name of the shipper, amount, cargo, boat, date, etc., written to a local insurance firm, does not authorize the firm to receive the premium and protect the shipment by an agreement for a policy.

SAME (30)—POLICY—EXECUTORY AGREEMENT—MARINE INSURANCE. A letter from insurance agents to a local insurance firm, offering to protect a prospective shipment and issue a policy of marine insurance, if advised of the name of shipper, amount, cargo, boat, date, etc., does not constitute a contract for insurance, although the local firm receipted for the premiums, where the shipment was lost before the data called for was received by the insurance company's agents.

SAME (10-12)—AGENTS—RELATIONS—POWERS. Upon an issue as to whether a local insurance firm, not agents of the insurer, was authorized, by correspondence, to protect a shipment or agree to the issuance of a policy of marine insurance, the insured, dealing with the firm at his peril, has the burden of proof, and cannot establish the agency by the evidence of the alleged agent, but must be considered to have read each of the communications as they took place.

[1]Reported in 181 Pac. 885.

Appeal from a judgment of the superior court for Clallam county, Alston, J., entered February 19, 1918, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Reversed.

Bogle, Graves, Merritt & Bogle, for appellant, contended, among other things, that there was no presumption or competent proof of agency. 2 C. J. 919; *O'Daniel v. Streeby,* 77 Wash. 414, 137 Pac. 1025, L. R. A. 1915F 634; *Woodworth v. School District No. 2,* 92 Wash. 456, 159 Pac. 757; *Stewart v. Helvetia Swiss Fire Ins. Co.,* 102 Cal. 218, 36 Pac. 410.

The letters did not give authority to write the insurance. 2 C. J. 432-434; *St. Paul Fire & Marine Ins. Co. v. McMillan,* 194 S. W. (Tex. Civ. App.) 1157.

There was no ratification. 2 C. J. 477, 479, 484, 485, 928, 949.

There was no contract of insurance. Wood, Fire Insurance (2d ed.), § 5; Joyce, Insurance (2d ed.), §§ 43, 44, 45; 1 Cooley's Briefs on Insurance, p. 413; *Ogle Lake Shingle Co. v. National Lumber Co.,* 68 Wash. 185, 122 Pac. 990; *Roberta Mfg. Co. v. Royal Exchange Assurance Co.,* 161 N. C. 88, 76 S. E. 865; *Todd v. German American Ins. Co.,* 2 Ga. App. 789, 59 S. E. 94; *Hartford Fire Ins. Co. v. Trimble,* 117 Ky. 583, 78 S. W. 462; *Baldwin v. Phoenix Ins. Co.,* 21 Ky. Law 1090, 54 S. W. 13; *Davis Lumber Co. v. Scottish Union & National Ins. Co.,* 94 Wis. 472, 69 N. W. 156; *Michigan Pipe Co. v. Michigan Fire & Marine Ins. Co.,* 92 Mich. 482, 52 N. W. 1070, 20 L. R. A. 277; *Clark v. Insurance Co. of North America,* 89 Me. 26, 35 Atl. 1008, 35 L. R. A. 276; *Cleveland Oil & Paint Co. v. Norwich Union Fire Ins. Co.,* 34 Ore. 228, 55 Pac. 435; *Mooney v. Merriam,* 77 Kan. 305, 94 Pac. 263.

T. F. Trumbull and *Rose & Lewis,* for respondent, contended, *inter alia,* that there was a contract for in-

surance rendering the appellant liable. 22 Cyc. 1448, 1449, note 63; *Alabama Red Cedar Co. v. Tennessee Valley Bank,* 76 South. (Ala.) 980; *Rezac v. Zima,* 96 Kan. 752, 153 Pac. 500, Ann. Cas. 1918B 1035; *Fries-Breslin Co. v. Bergen,* 168 Fed. 360; *Arndt v. Miller, Daybill & Co.,* 95 N. Y. Supp. 604; *Criswell v. Riley,* 5 Ind. App. 496, 30 N. E. 1101, 32 N. E. 814; *Chenier v. Insurance Co. of North America,* 72 Wash. 27, 129 Pac. 905, Ann. Cas. 1914D 649, 48 L. R. A. (N. S.) 319; *Russell v. O'Connor,* 120 Minn. 66, 139 N. W. 148.

MITCHELL, J.—Respondent brought this action to recover damages for an alleged breach of contract to procure marine insurance upon a cargo of canned salmon to be shipped from Clallam county to Seattle in November, 1915. At the close of respondent's proof, appellant challenged the sufficiency of the evidence and moved the court for a judgment of nonsuit. Again, at the close of all the evidence, appellant moved the court to direct the jury to return a verdict for appellant and against the respondent on the ground that the evidence failed to show any right of recovery on the part of respondent. And again, after the verdict and at the proper time, appellant made and filed a written motion for judgment *non obstante veredicto.* Each of the motions was denied and an exception taken. The jury returned a verdict in the sum of $2,500 for respondent, and from a judgment entered thereon, this appeal has been taken.

After the verdict had been received in the trial court, and after appellant had filed a motion for a new trial, it then, in writing, waived its motion for a new trial, but insisted upon its motion for a judgment *non obstante veredicto.* Respondent now objects to the consideration by this court of appellant's assignments of errors, it being contended that the waiver of the mo-

tion for a new trial carried with it and condoned whatever errors, if any, might have been properly considered under the motion for a new trial. Whatever may have been the rule in this respect at common law and according to the early decisions in this state, under the present practice, statutes, and the later decisions of this court, the rule is otherwise. In the case of *Dyer v. Middle Kittitas Irr. Dist.*, 40 Wash. 238, 82 Pac. 301, a verdict was rendered for the defendant; plaintiff made a motion for a judgment notwithstanding the verdict and for a new trial. Before the motions were passed upon, the motion for a new trial was withdrawn by the plaintiff and plaintiff's rights were submitted upon the other motion. It was overruled and judgment was entered on the verdict. This court considered the sufficiency of the evidence to sustain the judgment and reversed the case, ordering a judgment for the plaintiff. Again, in the case of *Forsyth v. Dow,* 81 Wash. 137, 139, 142 Pac. 490, this court said:

"A motion for a judgment *non obstante veredicto* is a creature of the common law. It is now entertained only in so far as it has been defined and assigned a particular function in our code of procedure. . . . Nor does the statute make the motion in any way dependent upon or concurrent with a motion for a new trial."

Other cases to the same effect are *Birch v. Abercrombie,* 74 Wash. 486, 133 Pac. 1020, 135 Pac. 821, 50 L. R. A. (N. S.) 59, and *Mattson v. Griffin Transfer Co.,* 90 Wash. 1, 155 Pac. 392.

The case was tried upon a second amended complaint. In the original complaint, appellant, the Pacific Marine Insurance Company, a corporation, and Davis & Woods, a copartnership, were all made defendants and served with summons and complaint. The complaint alleged, *inter alia,* that Davis & Woods

acted in the transaction as agents for appellant and the Pacific Marine Insurance Company, and recovery was sought for loss on a policy of insurance that Davis & Woods represented was or would be issued because of the receipt by them of the premium paid for the policy prior to the loss. The amended complaint was served and filed, continuing the case against all three defendants. A separate demurrer of the Pacific Marine Insurance Company to the complaint having been sustained, the case was dismissed upon motion of the plaintiff as to the insurance company, and also as to Davis & Woods. In the second amended complaint, the plaintiff sued, not on an alleged breach of contract of insurance, but on an alleged breach of contract to procure insurance.

The probative facts in the case are undisputed. Respondent was a resident of, and doing business in, Clallam county; J. M. Davis and P. J. Woods resided in Port Angeles, Washington, and were engaged in business as copartners, in the name of Davis & Woods; and appellant was and is a corporation of this state having its office and place of business in Seattle, and engaged, under its articles of incorporation, in the insurance business only as agent and broker for fire, marine and liability insurance companies. Appellant, as agent, represented, among other companies, the Pacific Marine Insurance Company, a foreign insurance company which wrote marine insurance in this state as an "Unauthorized Company," under § 75 of the insurance code of the state. Davis & Woods had no license from the state insurance commissioner to solicit insurance for the appellant or the Pacific Marine Insurance Company.

Respondent, intending to send two gas boats with cargoes of canned salmon from his cannery near the mouth of the Quillayute river, in Clallam county, to

Seattle, was solicited on November 20th by Mr. Davis, of the firm of Davis & Woods, to give them the application for the marine insurance on the cargoes. Davis told respondent he was the representative of the Pacific Marine Insurance Company, through Bowden, Gazzam & Arnold, of Seattle, and not being posted as to rates, he would write and find out what they were. Thinking there was insufficient time to attend to it by mail, Davis agreed to telegraph appellant. That afternoon (Saturday) Davis sent a telegram as follows:

"Port Angeles, Wash., Nov. 20, 1915.
"Bowden, Gazzam & Arnold, N. Y. Blk., Seattle, Wn.
"Write us best marine rate cargo salmon ex boats Albert and Rhododendron owned by Capt. Albert Johnson, this city, from cannery mouth Quillayute river, Clallam county to Seattle. Davis & Woods."

Appellant's office was closed on Saturday afternoon and the telegram was not delivered to it until Monday, November 22d, which was the first appellant heard of the transaction. Davis's statement to respondent on November 20 that his firm was agent of appellant was unauthorized. On Monday Mr. Arnold, secretary of appellant, replied to the telegram he had just received, as follows:

"Seattle, Wn., 11:59 A. M., Nov. 22.
"Davis & Woods,
"Port Angeles, Wn.
"Rate salmon thirty cents gasoline boats ten cents regular steamers see letter today.
"Bowden, Gazzam & Arnold."

On the same day, after sending the telegram, a letter was written and mailed from appellant's office as follows:

"Seattle, Wash., Nov. 22, 1915.
"Messrs. Davis & Woods,
"Port Angeles, Wash.
"Gentlemen: Your wire of the 20th was not received until this morning owing to the fact that we

always close the office on Saturdays at 1 p. m., and we therefore wired you this morning as follows: 'Rate salmon thirty cents gasoline boats ten cents regular steamers, see letter today.'

"The rate on cargo salmon from cannery at mouth of Quillayute river, Clallam county, to Seattle, if by regular steamers is but 10 cents per $100, while if shipped by gasoline boats the rate is thirty cents per $100, and we trust these rates will enable you to secure the business.

"The above rates quoted are for cargo under deck and are always twice as much when loaded on deck.

"Thanking you for this inquiry, and hoping to receive your order for the insurance, we remain,

"Yours very truly,
"Bowden, Gazzam & Arnold,
"W. W. Turner,
"Manager Marine Insurance Dept."

On November 22d, upon receipt of the telegram of that date from appellant, Davis informed respondent of the rates. Respondent testified he then told Davis:

"to write a policy, and he (Davis) explained they did not issue a policy on marine insurance like they do on fire, they would give me what he called a slip or receipt for the money—a memorandum or something of that kind."

On or about November 24th, Davis & Woods wrote to appellant as follows:

"Port Angeles, Wash.

"Bowden, Gazzam & Arnold,
"Seattle, Wn.

"Dear Sirs: Refer your letter 22nd inst. Shall we issue applicant a slip and contract such as you mailed us in June last, per enclosed blanks; if so, kindly mail blanks and when we are advised as to cargo we will issue slip to assured and mail copy to you.

"Kindly advise us in this matter that there is no hitch. Yours truly,
"Davis & Woods, Per J. M. Davis."

On November 27, appellant's office in Seattle wrote and mailed to Davis & Woods a letter as follows:

"Seattle, Wash., Nov. 27, 1915.

"Messrs. Davis & Woods,

"Port Angeles, Wash.

"Gentlemen: Replying to your letter of the 24th inst., have to state that if this order is for a single shipment it will not be necessary for you to issue an open policy contract with the assured. If you will advise us the name of the shipper, amount of shipment, nature of cargo, boat that it is shipped on, to and from what port and the date of sailing, we will protect the shipment for you and return one of our policies covering on the same.

"In our letter of June 5th, we sent you open policy for your own use, made out in triplicate. These were to have been signed by your firm and all returned to this office for the policy itself to be made out. Kindly do this now and we will then be able to complete the transaction.

"We have another agent up Sound that has taken care of several salmon shipments and we have issued policies from this office, on such information as requested above.

"Awaiting your advices, we remain,

"Yours very truly,

"Bowden, Gazzam & Arnold,

"W. W. Turner,

"Manager Marine Ins. Dept.

"Please return the open policy contracts signed, as requested."

In the meantime, about three o'clock on Saturday afternoon, November 27, respondent went to the office of Davis & Woods and gave them certain information relative to the shipments he wished covered by marine insurance. At that time respondent gave to Davis & Woods a check payable to them in the sum of $24.76, premium for insurance, and was informed by Davis & Woods the cargoes would be protected. Davis & Woods still retained the check at the time of the trial

of this case. About five or 5:30 o'clock in the afternoon on Saturday, November 27, Davis, by telephone, delivered to the telegraph company at its office in Port Angeles, to be forwarded to Seattle, a night letter as follows:

"Port Angeles, Wash., Nov. 27, 1915.
"Bowden, Gazzam & Arnold,
"N. Y. Bldg., Seattle, Wn.
"Launches Albert and Rhododendron sailed today from cannery Quillayute river for Seattle with cargo salmon, cover with marine policy favor G. M. Lauridsen eighteen hundred ninety cases value seven thousand and fifty-five dollars on Albert, three hundred eighty-eight cases value twelve hundred dollars on Rhododendron number cases each variety furnished if you require them. Acknowledge by wire.
"Davis & Woods."

This telegram, being a night letter, was not received by appellant until Monday morning, November 29. It bears a notation by the telegraph company "9:15 P," but it does not show if that was the time it was received by the company at Port Angeles or at Seattle. About six o'clock in the afternoon, Saturday, November 27, the boat carrying the cargo of salmon went on the beach, causing the loss involved in this suit. The real damage to the cargo occurred, however, in the subsequent exposure of the goods to the weather and in transferring them to a rescue boat on November 29. Davis & Woods learned Saturday night, November 27, that the boat had gone on the beach. Davis knew his night letter of Saturday, November 27, would not reach appellant until Monday morning, November 29. On Sunday, November 28—the same day Davis received appellant's letter written the day previous, and after he knew the boat had gone on the beach—he signed and delivered to respondent a writing as follows:

"Mr. G. M. Lauridsen to Davis & Woods, Dr. Dr. to premium marine insurance Rhododendron 1200 Albert 7055—8255 premium 24.76 paid 11-27-15. Davis & Woods, per J. M. Davis."

Monday morning, November 29, appellant wired as follows:

"Seattle, Wn., Nov. 29, 1915.

"Davis & Woods,

"Port Angeles, Wn.

"Your night letter wire dated Saturday received this morning newspapers report Albert on rock Friday night cannot protect except subject loss already sustained what are the facts.

"Bowden, Gazzam & Arnold."

Davis & Woods replied by wire as follows:

"Port Angeles, Wn., Nov. 29, 1915.

"Bowden, Gazzam & Arnold,

"Seattle, Wn.

"Albert grounded Saturday not Friday another wire states facts. Lauridsen gave us data Saturday afternoon on receiving same from Mr. Morse of the cannery, you advised us under date twenty-second you closed noon Saturday so we requested coverage by night letter consult correspondence re this shipment. Latest advices say no cargo lost and only damage if any is in handling. We advised Lauridsen he was covered when data furnished. We have solicited business for you per correspondence. Where are we, answer. Davis & Woods."

And again on the same day Davis & Woods sent the following wire:

"Port Angeles, Wn., Nov. 29, 1915.

"Bowden, Gazzam & Arnold,

"Seattle, Wn.

"Re insurance cargo salmon Lauridsen. Albert went aground mouth of river while going to sea, Snohomish could not reach her but Lauridsen has word today from cannery man that cargo has been taken

ashore. Have requested this man to preserve best manner possible until representative arrives.

"Davis & Woods."

On November 30, appellant wrote to Davis & Woods as follows:

"Seattle, Wn., Nov. 30, 1915.

"Davis & Woods,

"Port Angeles, Wn.

"Gentlemen: Owing to the fact that the writer has not been well and is not feeling able to make the trip tonight to Port Angeles, I am going to write you instead.

"The telegram which was received by the writer Monday morning was a night letter which left Port Angeles at 9:15 p. m., and the same being a night letter, of course was not received at the Seattle office until Sunday morning. In view of your telegram of today in which you state you were advised by Mr. Lauridsen Saturday afternoon of this shipment, beg to state that if you had sent us an immediate day wire 'rush' it would have been telephoned to our homes and proper insurance procured. As it is, this wire came to hand Monday morning, giving us no opportunity to place any lines in excess of what any one company we represent can carry. The greatest amount we are permitted to write in any one company on gasoline boats is $2,500, but had we been advised before the sailing of the vessel we could have placed in this market almost any amount.

"I wish you would advise me immediately whether the entire cargo has been saved or not and what has been done with the same.

"I presume Mr. Lauridsen is saving all cargo in every way possible to protect his interests regardless of the question as to whether he is covered by insurance or not.

"I did hope to see you tomorrow morning in person and go into the matter of the loss carefully and aid you in arriving at what the loss was, if any, but owing to my indisposition I am unable to go up tonight. I wish you would write me fully the details

of this loss; what has been done with the salmon, and as near as you can estimate,—what the loss is going to be and what the character of the loss will be.

"We intend to do everything in our power to save your client and yourselves from any loss in connection with this matter that is possible for us to do, but as to admitting or denying liability so far as the insurance company is concerned at the present time, I am unable to say just what position we will be obliged to take until we know all of the facts in connection with the loss; how it happened; what was done, and amount of loss or damage, if any.

"The great difficulty in the whole situation is the fact that you did not send us a day wire as soon as you were advised that this cargo was to be shipped.

"Awaiting your advices and assuring you that we shall protect you in every way possible consistent with good underwriting, we beg to remain,

"Yours very truly,

"Bowden, Gazzam & Arnold,

"E. C. Arnold."

Notwithstanding other assignments of error made by appellant, only one need be noticed in our view of the case. That one is a question of agency. The whole theory and effect of the cause of action, as stated and relied on, is the breach of an alleged contract to procure marine insurance. Agency was not admitted, nor was it alleged or attempted to be proven to be a general agency. There were no direct negotiations between respondent and appellant, and the whole matter must be determined by the written and telegraphic correspondence between the firm of Davis & Woods and the appellant. In considering the correspondence it must be kept in mind that appellant had no intimation whatever that Davis & Woods had represented they were appellant's agents. The communications consisting of the two first telegrams and appellant's letter of November 22 gave Davis & Woods

no authority to act as agents for appellant. There was nothing to show who Davis & Woods represented. Appellant, upon inquiry, simply quoted rates, and concluded its letter by saying it hoped to receive the order of Davis & Woods for the insurance—a statement insufficient to constitute the appointment of an agent. Had the letter gone so far as to express the hope that Davis & Woods would *receive* the order, it would yet have fallen short of the appointment of them as agents; for even that language would not have been inconsistent with appellant's position, then and now, to the effect that, before appellant could be bound, it must receive the order.

Concerning the letter of Davis & Woods of November 24 to appellant, it may be noticed, parenthetically, that in June, 1915, Davis & Woods attempted to place marine insurance for a person other than respondent, and for that purpose corresponded with appellant. It appears to have been a case in which insurance was not effected, although negotiations progressed to the extent of showing just what had to be done to bind appellant in that particular instance. In the present trial there was testimony, over appellant's objection, as to that transaction, which testimony was later stricken from the case. It clearly appears from their letter of November 24 that Davis & Woods recognized they had no authority to represent appellant, for they asked for advice as to what to do and how to do it. They asked if they should proceed according to a plan suggested on a former occasion and said: "If so, kindly mail blanks and when we are advised as to cargo we will issue slip to assured and mail copy to you." In other words, if it was their purpose to act for appellant, they not only sought such power, but asked for information as to details to be followed in

their conduct within the scope of that power. The letter shows that Davis & Woods were aware that appellant could not, and would not, be obligated until it had been heard from; and, as a fact, notwithstanding the promptness of appellant in answering the letter, Davis & Woods did not receive the answer until after the loss involved had occurred. Appellant answered the letter of Davis & Woods three days after it was written. If it was ever intended by appellant that Davis & Woods should represent it in this transaction, this letter alone expressed that intention. Special and not general authority was conferred. It said:

"If you will advise us the name of the shipper, amount of shipment, nature of cargo, boat that it is shipped on, to and from what port and the date of sailing we will protect the shipment for you and return one of our policies covering on the same."

There was no authority to Davis & Woods, in their name, to do anything to protect the shipment by insurance. The instructions were, "If you will advise us . . . we will protect," etc. If it be argued that this letter should be understood as giving authority to Davis & Woods to make the contract after collecting the data suggested and report to appellant, and that upon its receipt appellant would issue a policy that would relate back to the time Davis & Woods had purported to make the contract, that argument is successfully met in three ways. First, the language is not to that effect; second, if inference is to be indulged in, since there was at the date of the letter no information whatever to appellant sufficient to write the insurance, nor the time when the insurance would be required, the natural inference was that appellant had in mind there was sufficient time to get all the information necessary and write the policy before it was needed by the applicant for the insurance; and third, the whole

matter of the construction of the letter is immaterial because it was not received by Davis & Woods until the next day after the loss or damage to the cargo. Respondent, with some avidity, takes hold of the word "another," used in the letter where appellant said "we have *another* agent up sound," etc. But writing of a third person as *another agent* does not of itself prove the existence of, nor create, an agency in the person written to; while, on the other hand, the use of the word "another" in this instance is in harmony with the whole letter, as it referred to the addressees to the effect that the writer proposed to give them authority to do a given thing in a special manner.

This court, in the case of *O'Daniel v. Streeby,* 77 Wash. 414, 137 Pac. 1025, L. R. A. 1915F 634, called attention to and declared the general rule to be that third parties dealing with an agent must at their own risk ascertain both the fact and extent of the agent's authority, and the burden is on them to show that the acts of the agent were within the scope of his authority. The same rule was again declared in the case of *Woodworth v. School District No. 2,* 92 Wash. 456, 159 Pac. 757, wherein it was further said:

"Neither the fact of agency, nor the scope of the agent's authority, can be established by declarations of the alleged agent in the absence of the principal."

Such being the rule, respondent's rights are to be considered as if he had read each of the communications between Davis & Woods and the appellant at the time and as they took place.

On Monday morning, November 29, appellant, having learned through newspaper reports that one of the boats was already in trouble, and knowing that, by its letter of November 27, it had advised Davis & Woods how to proceed with reference to procuring

insurance, and upon receiving the night letter from Davis & Woods of the Saturday previous, promptly telegraphed Davis & Woods that it could not protect the cargo except subject to loss already sustained. The advice was cautionary and must be taken as intended to advise Davis & Woods that if they purposed to act under the authority given in appellant's letter of November 27 (now about due to reach Port Angeles), they must consider those instructions modified so as to apply to the cargo as it was at the time, and subject to any loss of the cargo that had already occurred. This telegram is inexplicable upon any other theory. It was to avoid any complication that might arise from any possible act on the part of Davis & Woods, under the letter of November 27, to now attempt to effect insurance which would relate back to a time prior to any damage or loss to the cargo. No responsibility would be assumed except subject to loss already sustained.

The two telegrams from Davis & Woods to appellant on November 29, and appellant's letter to them on November 30, do not alter the situation nor fix any liability on appellant. They amounted simply to a discussion between those parties. The letter contains no admission of agency on the part of Davis & Woods to bind appellant, nor of liability to respondent. There is no question of estoppel involved, for appellant never, directly or indirectly, advised respondent that Davis & Woods were its agents, nor has it received, or authorized any one else to receive, any money from respondent. There is nothing in appellant's letter of November 30, or in any other way, which amounted to a ratification of the representations of Davis & Woods to respondent that the cargo was protected by insurance. Indeed, ratification relates to an unauthorized act of an agent, while in this case

there is a failure of proof of agency existing at the time of the transaction; and besides, respondent by his pleading alleged an authorized act of an authorized agent.

Appellant, up to and including the happening of that transaction between respondent and Davis & Woods, indispensable to respondent's right to recover from any one, had done nothing that either respondent or Davis & Woods could rely on, other than answer an inquiry about insurance rates and express the hope it would receive an order.

We are satisfied the evidence in this case is not sufficient to justify any judgment against the appellant.

The cause is reversed, and remanded with instructions to dismiss the action.

CHADWICK, C. J., MACKINTOSH, MOUNT, FULLERTON, and PARKER, JJ., concur.

MAIN, HOLCOMB, and TOLMAN, JJ., dissent.

[No. 14821. *En Banc.* May 31, 1919.]

THE STATE OF WASHINGTON, *on the Relation of the City of Cle Elum, Plaintiff*, v. THE COUNTY OF KITTITAS, *Respondent.*[1]

EMINENT DOMAIN (29) — PROPERTY SUBJECT — CITY PROPERTY. Since the right of eminent domain does not exist by implication but must be expressly given by statute, a county has no right to condemn, for a county road, city property either within or without the city limits; notwithstanding Rem. Code, § 5879-18, giving counties the right to condemn lands in a city for the construction of permanent highways, the act not authorizing the condemnation of property of the city.

SAME (29). The fact that property of a city is not now all being devoted to a public use does not authorize its condemnation by another public corporation.

[1]Reported in 173 Pac. 698.

Certiorari to review a judgment of the superior court for Kittitas county, Truax, J., entered April 5, 1918, adjudging a public use and necessity, in condemnation proceedings for a county road. Reversed.

Pruyn & Hoeffler, for plaintiff.

Arthur McGuire, for defendant.

MACKINTOSH, J.—Kittitas county is attempting to exercise its right of eminent domain for the purpose of acquiring a right of way for a county road over land owned by Cle Elum, a city of the third class. Judgment of condemnation was entered by the trial court, and the action is here on the city's application to review that judgment.

Cle Elum, in 1910, acquired a tract of land approximately thirty-nine acres in area, situated about four miles outside of its corporate limits. The city created upon the property a reservoir for the storing of water to be used as an auxiliary supply for the city and its inhabitants. The public road over which traffic passes from the city of Easton to Cle Elum is located near the western boundary of the reservoir site and within two hundred and twenty-five feet of the reservoir. It crosses near the northwest corner of the tract and then extends in an easterly direction some distance beyond the north line of the tract. This road contains a heavy grade, and the county desiring to reduce this grade, in this proceeding seeks to condemn a right of way from a point near the northwest corner of the tract and extending in an easterly direction across it. This proposed new road would be a much easier grade than that of the old road, with which it again connects after it leaves the property here referred to.

The question for consideration is whether the county has a right to maintain the condemnation proceeding.

As we view it, it is unnecessary to determine whether the city owns the land over which it is proposed to construct the public road, in either its proprietary or governmental capacity. The elementary rule is that the power of a quasi-public corporation or a public corporation to condemn property owned by a municipality does not exist unless clearly created by statute. This rule was early recognized by this court in the case of *Seattle & M. R. Co. v. State*, 7 Wash. 150, 34 Pac. 551, 38 Am. St. 866, 22 L. R. A. 217. In that case it was held that a public service corporation could not take tide lands belonging to the state in a condemnation proceeding, for the reason that the act giving the corporation the right to condemn related only to the taking of private property, there being "no express or clearly implied authority to extend" the right further. Property acquired by a municipality which is necessary, or may reasonably be considered necessary in the future, for the use of the municipality in the performance of either its public or private functions, is not subject to condemnation unless that power has been expressly created. There must be left to the judgment and discretion of the municipal authorities the determination of the public necessity of acquiring and holding lands to be used for, and in connection with, public activities, and the courts will not interfere with the reasonable exercise of that discretion. The legislature, having conferred statutory power upon counties to condemn for county road purposes, has not gone to the extent of expressly allowing a condemnation for such purposes of the property of municipalities. In 1911, the legislature defined and provided for the construction of what are known as permanent highways (Laws of 1911, p. 118, ch. 35; Rem. Code, § 5879-1 *et seq.*), and in 1913, p. 384, § 1, gave the counties the power to construct such permanent high-

ways through the corporate limits of cities of the third and fourth classes. Rem. Code, § 5879-18. We held, in the case of *State ex rel. Floyd v. Superior Court,* 86 Wash. 410, 150 Pac. 618, that this act of 1913 was intended to be an addition to the act of 1911 and gave the counties the right to condemn property situated within cities of the third and fourth classes for the construction of *permanent highways.* This legislation would seem to indicate that the legislature recognized that no authority existed in the counties to condemn for either county roads or permanent highways, and to have chosen to expressly provide for such condemnation of the latter.

In the case we have here, we are not dealing with a *permanent highway.* The petition describes a county road, the language being: "the plaintiff by this petition seeks to acquire and appropriate the lands last above described for the purpose of constructing and maintaining thereon a public county road of Kittitas county etc." The fact that the property here sought to be condemned is outside of the corporate limits of the city is also outside of the issues of this case. Whether property is outside or inside the city's boundary is immaterial, for the reason that the city was given the power to own such property for the purpose for which this property was acquired and held. The fact that it may not have been all used for the storage of water does not warrant us in saying that it is not necessary for the purpose of a reservoir. As we understand it, a reservoir site may comprise more land than is actually necessary at the time of its acquisition, and more land than is ever actually used or is ever covered by water. The city has a right to acquire such an amount of land as it may reasonably be expected to eventually need for the purpose, which will include

such an amount as is necessary to protect the stored water from contamination and pollution.

From all the facts of the case, the court cannot say that the property sought to be condemned is not now devoted to a public use, nor that it is not necessary to satisfy the needs of the city which may be reasonably anticipated. It may well be, and probably is, true that the principal source of contamination and pollution of water stored some distance from a city's limits is that contamination and pollution which would come from the near presence of a public road, and it certainly seems that an area of thirty-nine acres is not too much to protect against such effects.

The action should have been dismissed for two reasons; first, that the law does not give the county the right to take a city's property for county road purposes by implication; such right must, if it exist, be given expressly. *Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586, 73 Pac. 670; *State ex rel. Attorney General v. Superior Court*, 36 Wash. 381, 78 Pac. 1011; *Tacoma v. Nisqually Power Co.*, 57 Wash. 420, 107 Pac. 199; *State ex rel. Wauconda Inv. Co. v. Superior Court*, 68 Wash. 660, 124 Pac. 127, Ann. Cas. 1913 E 1076; *City of Bridgeport v. New York & N. H. R. Co.*, 36 Conn. 255, 4 Am. Rep. 69; *Little Nestucca Toll-Road Co. v. Tillamook County*, 31 Ore. 1, 48 Pac. 465, 65 Am. St. 802; *Chicago, M. & St. P. R. Co. v. Starkweather*, 97 Iowa 159, 66 N. W. 87, 59 Am. St. 405, 31 L. R. A. 183; *City of Moline v. Greene*, 252 Ill. 475, 96 N. E. 912, 37 L. R. A. (N. S.) 104; *Evergreen Cemetery Ass'n v. New Haven*, 43 Conn. 234, 21 Am. Rep. 643; *City of St. Louis v. Moore*, 269 Mo. 430, 190 S. W. 867.

And second, as a matter of fact, conceding that the county has the right to condemn municipally owned property, the evidence does not disclose that this prop-

erty is not now being devoted to a public use. The mere fact that it is not all being actually inundated does not deprive it of its protection from condemnation. The case of *State ex rel. Washington Boom Co. v. Chehalis Boom Co.*, 82 Wash. 509, 144 Pac. 719, is in nowise inconsistent with the view here expressed. In that case a second public service corporation was allowed to condemn the property of the first, for the reason that the first was merely owning the property, and, as the opinion indicates, if the first owner had any present or prospective use for the property, the condemnation would not have been allowed.

The judgment of the lower court will be reversed.

CHADWICK, C. J., MOUNT, MITCHELL, TOLMAN, and FULLERTON, JJ., concur.

[No. 15034. *En Banc.* May 31, 1919.]

In the Matter of the Estate of WILLIAM B. BUSHNELL. CALVIN E. VILAS *et al., Appellants,* v. GEORGE M. BUSHNELL, *Respondent.*[1]

WITNESSES (44)—COMPETENCY—TRANSACTIONS WITH PERSON SINCE DECEASED. Evidence that a written statement given by deceased to witness had been lost, is not inadmissible as testimony of a transaction had with the deceased, where it was introduced to establish the existence of the contract.

HUSBAND AND WIFE (60, 65)—GIFTS (8)—COMMUNITY PROPERTY—EVIDENCE—SUFFICIENCY. Evidence that a husband delivered stock to his wife with the intent of making a gift, and that she received and continued to keep it in her possession and exercised and claimed ownership, sustains the burden of proving that it was voluntarily made and that the stock became her separate property.

Appeal from a judgment of the superior court for King county, French, J., entered November 15, 1917,

[1]Reported in 182 Pac. 89.

in favor of the defendant, dismissing proceedings for the probate of a will, tried to the court. Affirmed.

Peters & Powell, for appellants.

Kerr & McCord, for respondent.

MACKINTOSH, J.—William B. Bushnell died in Wisconsin, July 5, 1916, leaving a will, of which the appellant Rahr was appointed executor. The probate proceeding in the Wisconsin court was presented to the superior court of King county by certified copy, and a petition was filed for the appointment of the appellant Vilas to serve as administrator *cum testamento annexo,* the petition alleging that the heirs of William B. Bushnell were the respondent George M. Bushnell, his widow, and certain nephews and nieces mentioned in the will. The will bears date of November 25, 1914, and recites that all the testator's property was in the name and possession of his wife, George M. Bushnell, then a resident of the state of Washington, although the testator was the sole and legal owner of such property. After providing for his wife, the residue of the property was willed to the appellant Rahr, as trustee for the benefit of the children of his deceased brothers. To this petition the widow answered, which answer presents three objections to the petition; the first is determinative of this proceeding and is the only one we will consider; that being that there is no property or estate in King county belonging to Bushnell at the time of his death, and therefore that letters of administration cannot issue in that county.

It is agreed that Bushnell died in Wisconsin, and it may be assumed that he was a resident of that state. The property which it is claimed is in King county to give jurisdiction to the probate court of that county consists of the capital stock of the Seattle Ice Com-

pany. The shares of stock of this company have stood for a great number of years in the name of George M. Bushnell, the respondent, and are claimed by her as her separate property. The question then for determination is as to the ownership of this stock. If it is the separate property of the respondent, the superior court of King county had no jurisdiction to admit to probate the Bushnell will. The respondent's claim to the stock is that, in January, 1892, she received it as a gift from her husband, and that she has since that time held, owned and exercised exclusive control thereof.

This case presents to the court for review the life history of a man and woman who were married in November, 1884, and who came to this state in March, 1889. The respondent, a man of superior attainments and education, was, at several times during his life, the victim of a recurrent insanity which caused his confinement in different asylums. When not so confined, he was in the full possession of an intellect of more than average capacity, and exercised remarkable business judgment and acumen. The widow is a woman of dominating personality, possessed of a shrewd commercial instinct, united with a disposition of the most mercenary kind and a character of a most pronounced cupidity. From a small beginning, through a prolonged period of peril, a very successful business has been built up which the widow claims is her sole property. The story of the life and activities of these two persons presents a phase of human nature adequately analyzed in fiction only by Balzac's "Pere Goriot"; an epic of ingratitude. One is tempted to wish for the pen of this great artist to properly present the details of this tragedy, but for the discussion of the issue presented, such recital is unnecessary; suffice it to say that, in 1892, William B. Bushnell, in

the city of Portland, Oregon, it is claimed, gave to his wife all the stock which he held in the Seattle Ice Company and the ice companies owned by him in Tacoma and Portland, stripping himself bare of all his possessions, to thereafter lead a sort of fugitive life, alternating between long sojourns in mental hospitals as a ward of various states, with lucid intervals which for the most part were periods of unrelieved poverty and neglect. It is true that, at the time the stock was transferred, it may have been of somewhat doubtful value for the reason that the country was going through a period of depression and Bushnell's corporations were financially embarrassed. Since that day, Mrs. Bushnell has continued in the sole and exclusive possession of the stock and has exercised all the rights of ownership thereof, either through herself or agents whom she has employed to manage these corporations, until at this time the stock has become of exceedingly great value. During a large portion of the time since 1892, Bushnell was confined in hospitals where he received but the most meager attention from his wife, in fact, going for long periods without ever seeing her. Finally, on his release from the hospital for the insane in Illinois, in 1914, he went to Wisconsin in an effort to discover his nephews and nieces, the children of his deceased brothers who, after his death, were to become the beneficiaries of his will. The questions of law presented by the case are few; the question of fact, in the determination of which the entire record has been examined, we are constrained to decide as did the trial court, not, however, without letting it be recorded that we wish the result might be otherwise; this case being one where the respondent has established her right to her pound of flesh, with the court powerless to fulfill the commendable wishes of her deceased husband.

The questions of law involved are these: On the hearing, the trial court allowed Mrs. Bushnell to testify that a written statement given her at the time her husband presented the stock has since been lost. The testimony of the witness in this regard was not offered to prove the receipt or contents of the instrument, but to show its loss and laying the foundation for the introduction of secondary evidence of its contents, and therefore does not fall within the rule of *White v. Walker,* 84 Wash. 652, 147 Pac. 409; *Goldsworthy v. Oliver,* 93 Wash. 67, 160 Pac. 4, as Mrs. Bushnell was not testifying as to a transaction with the deceased, her evidence not being introduced to establish the existence of the contract contained in the writing, which had been testified to by another witness, but merely to show that she was unable to produce it and to allow the introduction of secondary evidence by other witnesses as to its contents.

The cases of *Garvey v. Garvey,* 52 Wash. 516, 101 Pac. 45; *Holly Street Land Co. v. Beyer,* 48 Wash. 422, 93 Pac. 1065; *Jackson v. Lamar,* 67 Wash. 385, 121 Pac. 857; *Meyers v. Albert,* 76 Wash. 218, 135 Pac. 1003, and *In re Slocum's Estate,* 83 Wash. 158, 145 Pac. 204, are relied upon as negativing a gift in the present case. The evidence, however, is that the husband delivered the stock with the intention of giving it to Mrs. Bushnell, that it was capable of delivery, and that the wife received it and continued to keep it in her possession and has exercised ownership over it and continues to claim ownership, and having assumed and carried the burden of proof, we are forced to hold that the gift was voluntarily made and that she has been and is the owner of the stock in the Seattle Ice Company as her separate property; and that, therefore, William B. Bushnell died possessed of no property in King county,

and the court of that county was without jurisdiction to proceed to the probate of his estate.

The action of the lower court is affirmed.

MITCHELL, TOLMAN, MOUNT, and HOLCOMB, JJ., concur.

PARKER, J., concurs in the result.

[No. 15146. Department One. May 31, 1919.]

THE STATE OF WASHINGTON, *Respondent*, v. ARNT ANDERSON, *Appellant*.[1]

CRIMINAL LAW (444) — INDICTMENT AND INFORMATION (111) — HARMLESS ERROR. A negative pregnant in an information charging larceny by false pretenses is not ground for setting aside a conviction.

SAME (110, 112) — FALSE PRETENSES (13) — EVIDENCE — OTHER OFFENSES. In a prosecution for larceny by false pretenses as to houses owned by the accused and that he was a contractor and builder, evidence of other instances of larceny committed by accused by similar false pretenses is admissible, not to show intent, but to prove the falsity of the pretense that he was a contractor and builder, by showing on the contrary that he was engaged in a fraudulent scheme (Modified on Rehearing).

SAME. Such evidence was admissible for the purpose of establishing criminal intent, since the acts charged did not in themselves characterize the offense.

Appeal from a judgment of the superior court for King county, Smith, J., entered April 27, 1918, upon a trial and conviction of grand larceny. Affirmed.

Carl J. Smith, Christopher Jacobsen, Joseph H. Smith, and *Oliver Anderson,* for appellant.

Fred C. Brown and *John A. Frater* (*Frank P. Helsell,* of counsel), for respondent.

MACKINTOSH, J.—Appellant has been found guilty of the crime of grand larceny, committed by false and fraudulent pretenses and representations. The in-

[1]Reported in 181 Pac. 696; 185 Pac. 624.

formation set out these false pretenses as consisting, first, of the representation that certain property in Oregon was worth "then and there the sum of $1,500 and that there was a house then and there upon said lots which was worth the sum of $3,400"; the second false representation being that the appellant was "then and there a contractor and builder"; and third, that appellant had at that time two or three houses which were being built by subcontractors, and one house which he was then and there building himself. The information, in alleging the falsity of these representations, says the property in Oregon "was not then and there worth the sum of $1,500, and there was not then and there a house upon said lots which was worth the sum of $3,400"; alleges that the appellant was not a contractor and builder, and that the appellant "did not have two or three houses which were being built by subcontractors or a house which he, the said Arnt Anderson, was then and there building."

The appellant attacks the information for the reason that the allegations as to the falsity of the representations as to the value of the property and the building of the houses above quoted are negatives pregnant, and therefore the information is rendered insufficient to charge a crime. Granting that the pleading of the falsity of the representations made is as claimed by appellant, the sustaining of an attack upon an information or the setting aside of conviction upon such purely technical objections is no longer indulged in by courts anxious to assist in the full administration of justice. A negative pregnant is not as serious a condition nor nearly as fatal in its effects as it was at one time in the history of pleading. As far back as the case of *O'Brien v. Seattle Ice Co.*, 43 Wash. 217, 86 Pac. 399, this view met the sanction of this court.

Appellant also protests that the evidence was not sufficient to sustain this conviction. We are rather inclined to the view that the evidence could hardly be made to sustain any other conclusion.

The last and most serious objection to the record is that witnesses were allowed to testify to other instances of larceny claimed to have been committed by the appellant against various witnesses who testified that they had parted with sums of money upon similar false pretenses and representations as those by which the prosecuting witness was entrapped. Appellant strenuously argues that the proof of these independent crimes was not proper, it being unnecessary to prove criminal intent. We are prepared to concede that this class of testimony, in a case of this character, is inadmissible if offered solely for the purpose of establishing criminal intent. We feel that, under the case of *State v. Smith,* 103 Wash. 267, 174 Pac. 9, this testimony was improper for that purpose. It was properly admissible, however, upon another ground, namely, to establish the falsity of the pretense that the appellant was a contractor and builder, the testimony of these various witnesses going to the establishment of the fact that, instead of being engaged in the contracting and building business, he was engaged in a plan and scheme of selling interests in a fraudulent venture. The state, having alleged that the appellant had represented himself as being a contractor and builder, and being called upon to prove the falsity of that representation, was entitled to put upon the stand those persons who had had dealings with the appellant and who, as a matter of fact, had purchased partnership interests from him, to testify as to the character of the business in which he was engaged.

The other objections to the introduction of testimony and to the instructions do not seem to present

questions which are necessary to be discussed in detail. The trial seems to have been without error, and the judgment of conviction must be, and is, affirmed.

CHADWICK, C. J., MITCHELL, and TOLMAN, JJ., concur.

MAIN, J., concurs in the result.

ON REHEARING.

[*En Banc.* December 2, 1919.]

PER CURIAM.—The evidence of other crimes was properly admitted in this case for the purpose of establishing criminal intent, this being a case where the acts charged against the defendant did not in themselves characterize the offense, and is thus distinguished from *State v. Smith,* 103 Wash. 267, 174 Pac. 9. To this extent, the departmental opinion is modified.

[No. 15147. Department One. May 31, 1919.]

C. F. JOHNSON *et al., Appellants,* v. WESTERN EXPRESS COMPANY, *Respondent.*[1]

CARRIERS (32)—OF GOODS—LOSS—EVIDENCE—ADMISSIBILITY. In an action against an express company for a lost trunk and contents, left at a hotel and four months later directed to be delivered to the initial carrier by the hotel, the plaintiffs' evidence of the contents of the trunk at the time it was delivered to the hotel is inadmissible without proof that the trunk and contents delivered to the initial carrier was the same trunk and contents received by the hotel from the plaintiffs.

EVIDENCE (21) — PRESUMPTIONS. A presumption can be legally indulged in only when the facts giving rise to it are proved by direct evidence, not when they rest upon a presumption.

PLEADING (50, 56)—DENIALS—SUFFICIENCY—ADMISSIONS. The general issue as to the contents of a trunk is presented in an action to recover for a lost trunk and contents, alleged to have been delivered to the initial carrier by a hotel as agent of the plaintiffs, where

[1]Reported in 181 Pac. 693.

the answer admitted the delivery and transportation of one trunk consigned by the hotel to the plaintiffs, and denied all other allegations of the complaint describing the trunk and its contents; nor does a cross-complaint for a balance due on transportation charges on the trunk "referred to in plaintiffs' complaint," admit the allegations descriptive of the trunk and its contents.

CARRIERS (31, 32)—OF GOODS—LOSS—PLEADING AND EVIDENCE. In an action against an express company to recover for a lost trunk and contents, defendant's answer admitting that it received a trunk for plaintiffs, does not preclude the granting of a nonsuit, where no evidence was introduced as to its value.

Appeal from a judgment of the superior court for King county, Tallman, J., entered April 26, 1918, upon granting a nonsuit, dismissing an action for conversion, tried to the court. Affirmed.

Christopher Jacobsen, for appellants.

C. H. Winders (Joseph C. Sherman, of counsel), for respondent.

MITCHELL, J.—C. F. Johnson and wife by this action seek to recover damages for the loss of a trunk and its contents, of the alleged value of $1,498, which they claim respondent wrongfully converted by a sale thereof, thereby placing the same beyond recovery. At the trial to a jury, upon the conclusion of plaintiffs' proof, defendant challenged the sufficiency thereof, on the ground there was no evidence that the property mentioned in the complaint and referred to in the testimony was ever delivered to the defendant. The motion was granted and the cause dismissed. From the judgment of dismissal, plaintiffs appeal.

There is a large number of assignments of error, all of which, as appellants confess in their brief, go to the same point, namely, the ruling of the trial court rejecting all testimony offered as to the value of the trunk and its contents. In the latter part of October, or the first of November, 1913, appellants packed their

trunk at Regina, Saskatchewan, Canada, and took it with them to Winnipeg, Canada, where they remained about three weeks, having the trunk sent to their room at the hotel. The trunk was not opened at Winnipeg, from which place they went to Calgary, Alberta Province, Canada, taking the trunk with them, about December 1, 1913. Mrs. Johnson testified that, on arriving at Calgary, the trunk was delivered as they reached their hotel, and that she saw it placed in the public storeroom of the hotel, at which time she claims it was in the same condition it was after being packed and when they left Regina. No one who testified at the trial had seen the trunk since it was placed in the storage room of the hotel at Calgary. It was described by appellants as "roped with two or three strands of heavy rope around it both ways, and locked." After staying in Calgary about a week, appellants came indirectly to Seattle, arriving there about January 21, 1914, the trunk having been left in the storage room of the hotel at Calgary.

Mr. Johnson testified he wrote to Calgary, early in March, 1914, for the shipment of the trunk by express to Seattle, and that thereafter, expecting shipment, he called at the offices of all the express companies in Seattle, including respondent, first, on March 20, 1914, again on April 8, 1914, and a number of times thereafter within the next two years, at each of which calls he was informed there was no shipment for him. In reply to a letter from Mr. Johnson, the Dominion Express Company at Calgary, by letter dated July 11, 1916, advised him of the shipment to him of a trunk on March 23, 1914, and to inquire concerning it at this respondent's office in Seattle. Upon taking up the matter with respondent, records of its office were examined, and it was then found that a trunk consigned by the Queens Hotel at Calgary to C. F. Johnson, 2619

First avenue, Seattle, had arrived in Seattle on March 26, 1914, in bond, and was delivered to the United States customs appraiser's storeroom, and that on that date respondent gave notice to appellant by postal card, addressed 2619 First avenue; that, after it passed the custom house, where it was appraised at $5, respondent mailed a second notice to appellant on May 1, 1914, and a third notice on June 1, 1914, and that no reply was received to either notice, nor either card returned as unclaimed; that respondent sent the trunk out for delivery, after receiving it from the customs appraiser, and it was returned to respondent's "on hand" room with the notation that the consignee was not located at the address given on the shipment; that, on May 22, 1914, respondent notified the shipper at Calgary of its receipt of the shipment, that it could not be delivered, was not called for, and that, if not accepted or instructions given within thirty days, it would be sold for charges; that the trunk had been disposed of at an "on hand" sale in April, 1915, on account of being unclaimed, at the price of $2; and that there was no record of the purchaser and it could not be recovered. Appellants were advised by respondent, in June and August of 1916, of such records in its office. At the trial, appellants testified they never received either of the postal card notices and that no attempt at delivery of the trunk was made to their knowledge. On September 16, 1916, appellants presented to respondent a written claim and demand for payment in the sum of $1,498 for the trunk and its contents, which being refused, this action was brought.

At the trial it was proposed to have each of the appellants testify concerning the contents of the trunk and their value. This was objected to unless it was followed by proof that the trunk and contents were

delivered to the initial carrier at Calgary. Appellants not offering to comply, the objection was sustained. It is on this ruling and the consequent judgment of nonsuit appellants have argued the case here. They call attention to the rule in 16 Cyc. 1052, as follows:

"Proof of the existence at a particular time of a fact of a continuous nature gives rise to an inference, within logical limits, that it exists at a subsequent time";

or, as stated in *Ellis v. State,* 138 Wis. 513, 119 N. W. 1110, 131 Am. St. 1022, 20 L. R. A. (N. S.) 444:

"When the existence of a person, a personal relation, or state of things is once established by proof, the law presumes that the person, personal relation, or state of things continues to exist as before, until the contrary is shown, or until a different presumption is raised from the nature of the subject in question."

With this general rule in mind, it is argued that, having shown the condition and delivery of the trunk, and that it contained their wearing apparel at the time they arrived at the Queens Hotel in Calgary, that respondent received a trunk with contents, consigned about four months later by the Queens Hotel in Calgary to appellant, C. F. Johnson, at Seattle, and that a trunk and contents thus shipped had been sold later by respondents, therefore, they were entitled to testify as to the contents of the trunk and their value.

The trouble is the applicability of the rule invoked. There is here a lack of evidence, not only as to the contents of the trunk, but of the appearance and condition of the trunk delivered to the initial carrier at Calgary and thence to respondent. Had someone connected with the hotel at Calgary testified that the trunk delivered to the initial carrier at that place was the same trunk received by the hotel for appellants about December 1, 1913, "roped with two or three

strands of heavy rope around it both ways, and locked"; or if the records of respondent showed that the trunk referred to by its records was "roped with two or three strands of heavy rope around it both ways, and locked," there would be force in appellants' contention. But such is not the case. Here, we are not considering a case involving the rule of the transmission of goods by several connecting common carriers, upon proof showing the condition of the goods at the time of delivery to the initial common carrier or its agent, with the resultant presumption in favor of the owner declared by the policy of the law generally, but one in which the proof shows only the condition the goods were in and what they consisted of at the time of delivery to one not a carrier or its agent, but an agent of the owner some four months prior to delivery by such owner's agent to the initial carrier. It is not a case simply of the presumption that the final carrier received goods or goods in the same condition as those delivered to the initial carrier, but one which carries another presumption that the goods delivered to the owner's agent, not a carrier, were, after considerable time, delivered by that agent to the initial carrier in the same condition he had received them. It amounts to a presumption resting on a presumption, which is not permitted in the law, and is inconsistent with the presumption of continuity of condition spoken of in the rule relied on by appellants.

In 10 R. C. L., page 870, § 13, under the subject of evidence, it is said:

"It is a well-established rule that a presumption can be legally indulged only when the facts from which the presumption arises are proved by direct evidence, and that one presumption cannot be deduced from another. To hold that a fact inferred or presumed at once becomes an established fact, for the

purpose of serving as a base for a further inference or presumption, would be to spin out the chain of presumptions into the regions of the barest conjecture."

And, by way of illustration, the same authority, citing *Manning v. John Hancock Mut. Life Ins. Co.*, 100 U. S. 693, says:

"Accordingly a presumption that insurance premiums have been paid over by insurance agents to the company cannot be based on a presumption that the premiums were paid to the agents; nor can the latter presumption be based on a presumption that certain policies did not lapse, or that they were renewed."

Such was the condition of the proof that the trial court was right in the ruling complained of.

Appellants claim, however, the situation was relieved and the ruling erroneous, considering the pleadings. They contend respondent, by its answer and cross-complaint, in effect admits the receipt of the trunk and its contents as described in the complaint. But we do not so understand the pleadings. Without setting them out, it is sufficient to say that, after specifically admitting the Queens Hotel delivered to the Dominion Express Company at Calgary one trunk consigned to C. F. Johnson, 2619 First avenue, Seattle, which was transported by that express company and thence by respondent to Seattle, the respondent denied all the other allegations of the complaint describing the trunk and its contents, and also denied the alleged negligence of respondent in its failure to deliver the trunk. The general issue was presented as to the contents of the trunk, which was the principal cause of the controversy, for the value of the trunk itself was stated in the complaint to be $5. It is true that respondent, mindful of its obligation to the government as a common carrier to collect all transportation charges, further answered by way of cross-complaint

to recover a balance of $5.70 due by appellants over what it had received for the trunk and its contents at the "on hand" sale, and therein alleged it had received from the initial carrier, as the agent of appellants, one trunk forwarded by the Queens Hotel at Calgary and assumed transportation charges already accrued thereon, "being the trunk referred to in plaintiffs' complaint," but this allegation, construed with all other parts of the answer, clearly refers to the trunk itself that was shipped, and not its contents or the condition of the contents. Appellants were suing to recover for a trunk, among other things, consigned to them from Calgary, as to which respondent claimed it was entitled to $5.70 more for transportation charges; thus falling far short of any admission that it had ever received that trunk or its contents, claimed by appellants to have been packed by them at Regina with $1,498 worth of personal effects and later left by them at the Queens Hotel, Calgary.

Lastly, it is claimed a nonsuit should not have been granted because, respondent having admitted it received a trunk shipped to appellants from Calgary, they were entitled to recovery for its value; but there is no evidence in the record to show its value, nor was any offer made to show its value except in connection with its contents.

Finding no error in the record, the judgment is affirmed.

CHADWICK, C. J., MAIN, MACKINTOSH, and TOLMAN, JJ., concur.

[No. 15188. Department Two. May 31, 1919.]

HOOD MANUFACTURING COMPANY, *Appellant*, v. J. MATZGER *et al.*, *Respondents*.[1]

LANDLORD AND TENANT (63) — IMPROVEMENTS — COST. Where rental for a building was to be based on its cost, architect's services (although his plans and specifications were deviated from by mutual agreement) and the salary of an adult son who kept books and assisted in overseeing the work, are properly chargeable as a part of the costs of the building.

SAME (63). In such a case, the cost of the building is not shown to be less than $6,500, from the fact that a contractor bid $5,300 on the main part of the building, where additional items brought the cost up to $7,000.

Appeal from a judgment of the superior court for King county, Ronald, J., entered June 26, 1918, upon findings favorable to the defendant, in an action for equitable relief, tried to the court. Affirmed.

Max Hardman, for appellant.

Revelle & Revelle, for respondents.

HOLCOMB, J.—Respondents, J. Matzger and wife, entered into a written agreement and lease with appellant manufacturing company on April 2, 1917, by the terms of which respondents agreed to erect a building at the northwest corner of First avenue south and Horton street, in the city of Seattle, and lease the same to appellant for a period of ten years from the completion of the building. It was further agreed that the amount of the monthly rental should be figured upon the basis of the cost of the building to respondents, that is, if the erection of the building cost respondents less than the sum of $6,500, the monthly rental payable by appellant was to be $125; in the event that the cost of the building should be more than $6,500, the

[1]Reported in 181 Pac. 863.

rental was to be $137.50 per month. Among certain other covenants contained in this lease, it is material to notice one which provided that the lessors gave the lessee an option (to be exercised by the lessee within two years from the date of the completion of the building) to purchase the property (realty and building) at the price of $22,000, payable $5,000 cash and the balance in 120 monthly payments of $141.66, with 6 per cent interest.

Thereafter Matzger and wife erected a building at the agreed site, and the appellant moved in and took possession thereof. On May 31, 1917, appellant wrote respondents, in part, as follows:

"Referring to the building which you have erected for us at the northwest corner of First Avenue South and Horton Street, this city, we wish to call attention to the fact that the building has not been erected by you as agreed upon, and is deficient in many respects, correction of some of which we are willing to waive, but we do insist that the following matters be corrected:"

Then follow eleven items of alleged necessary corrections, the whole concluding with a statement that appellant company presumes that the incompleted work such as wiring, plumbing etc. will be properly performed before respondents' men leave the work.

On June 20, 1917, appellant company again wrote respondents, in part, as follows:

"However, unless we hear from you to the contrary promptly, we will take it for granted that your letter of June 5th is intended as a refusal on your part to make good any of these defects that have been called to your attention, and we will proceed to take such steps to enforce our rights as may be necessary.

"Incidentally, we wish to advise you that we are not willing to accept your statement as to the cost of the building, and we demand that you at once furnish us

with an itemized statement showing in detail the cost of the various items involved in the construction of the building, supported by proper vouchers."

The dispute, of which these letters are the obvious evidence, culminated in an action by appellant, setting up the lease and agreement and alleging that Matzger and wife had refused to account for the cost of the building; that the building had not cost more than the sum of $6,500; that the reasonable rental value of the building erected by the Matgers was less than the rental value of the building agreed to be erected by them in the sum of $35 per month; that the building erected was of a less value than the building agreed to be erected; and praying that the Matzgers be required to account for the cost of the building; that the court determine the amount of the rental to be paid on the actual valuation; and that the lease be reformed as to the option price of $22,000 at which appellant might purchase the property, changing to the sum of $18,500, and asking judgment for excess of rental already paid over the amount which the court should determine properly to be paid.

Trial in the lower court without a jury resulted in findings that the building had cost more than the sum of $6,500, but that it had not been erected according to the agreement, whereby the manufacturing company (appellant here) was damaged in the sum of $1,200, that sum representing what it would cost to install a floor in the working part of the building such as was called for by the plan, and distributed that amount through the one hundred and twenty months of the lease at the rate of $10 per month, making a rental to be paid in the sum of $127.50, and gave the plaintiff judgment for the sum of $120, representing the excess of $10 per month already paid for twelve months. The trial court refused to modify or reform the lease in

any particular, including the option price of $22,000 therein agreed on.

The crux of the whole matter is clearly the cost of the building, for that is made the basis of the monthly rental and is urged as a reason for the requested modification of the option price. The question as to the actual construction of the building differing from certain agreed plans is secondary even to this matter, such variance justifying, according to appellant manufacturing company, not the surrender of its lease, which it did not desire or attempt, but merely a modification of the rental terms. This difference—and it is agreed that there is a difference between the plan and the construction of this building—is but an angle of the larger question as to the initial cost of the building.

It is incontrovertible that the agreement between the parties contemplated the construction of a building as cheaply as possible, it having been estimated that a building such as appellant desired would cost about $8,000, and it being desired by both parties to bring the cost of the building down to $6,500, or as near thereto as possible, it was understood and agreed that second-hand material should be used in the construction of the building as far as practicable, and that changes should be made, and were made by agreement of the parties, to reduce the cost of the building. The architect who drew the plans drew them from a rough sketch prepared by appellant's president as to the kind of building desired for his purposes, and it was understood and agreed that a plan with specifications had to be presented to the city authorities in order to obtain a building permit, but that neither party understood or agreed that such plans and specifications were to be rigidly adhered to, but only followed in general outline. The original agreement between the parties, it

should be noted, had stipulated that the building should be constructed according to *"a sketch OK'd by"* appellant. Much contention is made against the payment of the bill for the architect's services, amounting to $450, which amount the respondents obligated themselves to pay. While it is true that the plans and specifications as submitted by the architect were substantially departed from, it is not true that the plans and specifications contemplated by the parties, based upon the "sketch as OK'd" by appellant, and according to which the architect's more comprehensive plans and specifications were made, were departed from. For this reason the architect's services chargeable to the owner are also chargeable to the lessee under the agreement. We have held that architect's services are even lienable against a building, and even though they may not have been strictly followed, they are nevertheless recoverable.

Another item of the cost of construction vigorously contested by appellant was that of the son of respondents, who was paid wages aggregating $225 for nine weeks work. It appears that the son kept the books, helped his father in negotiations with contractors concerning the letting of portions of the work, purchasing lumber, keeping the time of employees, overseeing the work and doing general clerical work. He was of full age and his parents were not entitled to his services. The lower court held that the wages of the son were properly chargeable to the cost of construction, and we see nothing in the record to show to the contrary.

The claim of J. Matzger, one of the respondents, for wages and car fare in the amount of $250, in overseeing the construction, was disallowed by the trial court, and therefore is not to be considered.

Various other items were allowed by the court which

we think properly entered into the cost of the building, and no just reason is shown to the contrary.

Appellant showed that a firm of contractors bid $5,300 to construct the building, arguing therefrom that $5,300 was properly the cost of construction of the building. This by no means follows, and moreover, this bid did not include plumbing, wiring, roofing and painting, which cost the respondents $1,217; this added to the bid would bring the total amount over $6,500. Also it did not include the sheet metal skylights and architect's fee, which would have made in all more than $7,000.

Upon an examination of the whole record, while at first blush we were inclined to the opinion that some of the items disallowed by the trial court to appellant and allowed to respondents as properly chargeable to the cost of construction should not have been allowed respondents but should have been deducted, we are now of the opinion that appellant did not sustain the burden of proof as to those items, and that the court was generous, rather than exactly just, in allowing $1,200 on account of defective flooring. The court found that the building cost in excess of $6,900, and while this may not be exactly correct, it is certainly correct that it cost in excess of $6,500. Unless it cost less than $6,500, the provision as to the rental of $125 per month could not apply, and the court's deduction and apportionment of the rent from the $1,200 damages allowed on the rental value to respondents awards substantial justice. There is no basis for the reformation of the lease. The findings of the trial court were based on conflicting evidence and will not be disturbed unless contrary to the great weight of evidence, and this we cannot find to be the case.

The judgment is affirmed.

PARKER, MOUNT, and FULLERTON, JJ., concur.

[No. 15257. Department One. May 31, 1919.]

OREGON-WASHINGTON LUMBER & MANUFACTURING COMPANY, *Plaintiff*, v. BAY CITY LUMBER COMPANY, *Defendant*.[1]

APPEAL (418) — REVIEW — FINDINGS. **Findings upon conflicting testimony given mostly in person will not be disturbed on appeal where the evidence does not clearly preponderate against them.**

Cross-appeals from a judgment of the superior court for Grays Harbor county, Sheeks, J., entered June 22, 1918, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

W. H. Abel, for plaintiff.

John C. Hogan, for defendant.

TOLMAN, J.—Both parties have appealed from the judgment below, and they will be referred to herein as plaintiff and defendant. The plaintiff, a wholesale dealer in lumber, brought this action, alleging that, in January, 1916, it entered into a written contract with the defendant by which the defendant agreed to sell, and the plaintiff agreed to buy, 200,000 feet of select and better tent stock, worked to pattern, of certain specified sizes and dimensions, at $25 per thousand, "Terms: 90 per cent advance on net invoice with bill of lading; final settlement on receipt of consignee's report and expense bill, less usual 2% discount. Rate 55c less 5% on the net to us. Prices f. o. b. 55c rate." It was further provided in the order: "You may commence shipping any time within the next two or three weeks, and let a car go forward at the rate of one every two weeks or every week." It is further alleged, that

[1]Reported in 181 Pac. 687.

shortly thereafter the defendant shipped two car loads of the lumber under and in accordance with the terms of the contract, aggregating 54,180 feet and no more, all of which was duly paid for, but that the defendant has ever since failed and refused to ship the remaining 145,820 feet called for by the contract; that the value of such lumber had increased from $25 per thousand at the time of the execution of the contract, to $40 per thousand at the time of the breach, and plaintiff had been damaged to the extent of $15 per thousand by the failure to deliver; and the prayer of the complaint is for judgment for the aggregate of such damages, with interest.

The answer admitted only the corporate existence of the parties; denied that the contract was one of purchase and sale; and alleged that plaintiff is and was a lumber broker and sale's agent for lumber, and for a long time before the making of this contract had been employed to a greater or less extent by the defendant as a sale's agent, selling its output upon a commission of five per cent; that plaintiff represented, at and before the making of this contract, that it had sold the lumber described in the contract to a customer in St. Louis at the prices named in the contract, and that its only profit upon the transaction was to be a five per cent commission on the net amount realized; whereas, in fact, the plaintiff had not sold such lumber, or any part thereof; and that, after two cars had been shipped, the plaintiff was wholly unable to handle the remainder of said lumber, directed shipments to be withheld, and thereafter failed and refused to give any shipping instructions; that defendant was, and for a long time remained, ready, able and willing to ship the remainder of the lumber, but finally, because of the misrepresentations as to the sale, which it then discovered, and the failure to give shipping instructions,

defendant elected to, and did, abrogate and terminate the contract. Counterclaims were also pleaded, the first, to the effect, that as such selling agent, the plaintiff had wrongfully increased the price to the consumer of four car loads of lumber manufactured by defendant and shipped through plaintiff under this or similar orders, thereby obtaining a secret profit of $238.28 in excess of the purchase price as reported to defendant, which it wrongfully retained; and the second, to the effect that, by the same course of dealing, with an allied concern known as the Anderson & Middleton Lumber Company, plaintiff had secured and wrongfully retained $1,689.82 belonging to that company, whose claim therefor had been duly assigned to the defendant. All of the affirmative matter in the answer and counterclaims was denied by the reply.

The case was tried to the court without a jury, resulting in findings to the effect that the transaction set out in the complaint was one of purchase and sale; that the relation of principal and agent did not at any time exist between the defendant or its assignor and the plaintiff; that defendant had breached the contract which is described in the complaint, and that plaintiff was damaged by such breach in the sum of seventy cents per thousand upon 145,820 feet of lumber not delivered, or a total of $92.70, for which sum judgment was entered.

By appeal and cross-appeal, each party is presenting here the claims which it presented in the trial court. But the issues are issues of fact only. Thus we have been called upon to make a careful study of the evidence in the case, and after having done so, we cannot say from the cold record, which alone is before us, that the findings of the trial court are not sustainable under the familiar rule which we have so long followed and so often announced. *Miller v. Reeves,* 101 Wash.

642, 172 Pac. 815. While some of the testimony in this case was by deposition, the major part of it, and that which was most vital and controlling, was given by witnesses who testified in person upon the trial below. The testimony on behalf of each party followed closely the lines of their respective pleadings; and since to attempt to set out and analyze the whole would be impossible within the confines of an ordinary opinion, and as anything less than the whole might be unfair, we must content ourselves by saying that it does not clearly appear that the evidence preponderates against the findings of the trial court and therefore the judgment appealed from must be affirmed. Neither party will recover costs in this court.

MAIN, FULLERTON, MITCHELL, and MACKINTOSH, JJ., concur.

[No. 15266. Department One. May 31, 1919.]

SKOOKUM LUMBER COMPANY, *Respondent*, v. SACAJAWEA LUMBER & SHINGLE COMPANY, *Appellant*.[1]

CHATTEL MORTGAGES (61)—FORECLOSURE—INSECURITY OF DEBT—REASONABLE JUSTIFICATION. To entitle a chattel mortgagee to a foreclosure under the insecurity clause when he "deems" himself insecure, he must act in a reasonable manner; and it is no justification for premature suit that the mortgagor had sent away from the mill a few small items of no particular value not impairing the security, which had been greatly increased since giving the mortgage; nor that there was a breach of the warranty in the mortgage against incumbrance by the existence of two conditional sales contracts, known to the mortgagee when it made the loan; nor that the mortgagor was indebted on several outstanding obligations, where the mill had just been completed and when operated would show a net daily profit.

SAME (61). Upon an issue as to whether plaintiff acted reasonably in "deeming" himself insecure and instituting an action to

[1]Reported in 181 Pac. 914; 187 Pac. 410.

foreclose a chattel mortgage on mill machinery before maturity of the debt, the fact that the mortgagee failed to furnish logs or shingle bolts to keep the mill running, as contemplated by a contract between the parties, may be considered as bearing upon his good faith in attempting foreclosure, although the contract did not obligate the mortgagee to furnish the logs.

MITCHELL, J., dissents.

Appeal from a judgment of the superior court for Thurston county, Wright, J., entered June 27, 1918, in favor of the plaintiff, in an action to foreclose a mortgage, tried to the court. Reversed.

Fremont Campbell and *Harry H. Johnston,* for appellant.

Thos. M. Vance, for respondent.

MACKINTOSH, J.—Upon the respondent's allegation that its security had been rendered insecure, it brought this action, before the maturity of the debt, to foreclose a $4,000 mortgage held by it upon the mill property of appellant. The appellant's defense to the action consisted of its allegation that no justification existed for the premature foreclosure, and that the financial difficulties which were troubling it were occasioned by the failure of respondent to comply with the terms of its contract with appellant to furnish timber from which the appellant was to manufacture shingles.

The respondent leased to one Tucker the property upon which the mill in question was constructed, and contracted with Tucker for the operation of the mill. Tucker assigned the contract to the appellant, which procured from the respondent the sum of $4,000 upon two notes, executed on May 15 and June 1, 1917. Afterwards, a request being made by the respondent for a mortgage, on June 11, 1917, the mortgage securing the notes was executed. Improvements on the

property in the sum of approximately $13,000 were subsequently made by appellant, and, at the time of the commencement of this foreclosure, the mill and premises were worth in the neighborhood of $25,000. The notes had been renewed and, at the time of the institution of this action, one would have been due in January, 1918, and the other in February, 1918; this mortgage foreclosure was begun in November, 1917. The debt not being then due, the action was begun under the clause of the mortgage which provided that:

". . . all of which property is now in the possession of said party of the first part in Thurston county, Washington, and is free from all liens and incumbrances . . . But if default be made in the payment of said sums of money or the interest thereon, or any part thereof, at the time the same shall become due, or any attempt shall be made to remove any of said property from said county, or to dispose of the same without the written consent of the said second party or its successors or assigns, or if said party shall fail or neglect to take proper care of any of said property, or if at any time said second party shall deem itself insecure, then and thereafter the entire debt secured by this mortgage shall be due and payable."

To entitle a mortgagee to foreclose under the insecurity clause of a mortgage when he "deems" that proceeding necessary, he must act in a reasonable manner. To be allowed to avail himself of the privilege there must exist proper cause to apprehend some loss to his security; he cannot act in a purely arbitrary manner. Respondent, in order to exercise the rights which it claimed, alleged that the appellant was removing certain of the machinery and equipment embraced within the mortgage, and was disposing of it with the intention of defrauding the respondent and other creditors. The proof upon this point shows that

a few small items of no particular value had been sent away from the mill. Their absence in no way could have been intended to, nor did it, impair the respondent's security. It was an ordinary transaction carried on openly and in good faith. As we have already shown, the mortgage security had been greatly increased from the time of the giving of the mortgage until the foreclosure, rather than having been impaired.

Respondent next contends that there was a breach of the warranty contained in the mortgage, in that some of the property mortgaged was not free and clear from all incumbrance, there being, in fact, two conditional sale contracts on part of the mill equipment. The record shows that the respondent must have known of the debts which were represented by the conditional bills of sale before it made the loan to the appellant. Further than this, it is established that one of the appellant's stockholders and officers had, before this action was commenced, made arrangements for a loan and had actually secured the money thereon which he was ready to use in the full extinguishment of the two debts referred to, but that, finding that the respondent was refusing to deliver timber to the appellant, without which the mill could not operate, he returned the money to the bank from which he had borrowed it. Under these facts, the respondent is not entitled to complain as to the existence of these conditional sale obligations.

The appellant further claims that the debts against the mill were in such amounts that his security was rendered doubtful. It is true that the appellant had several outstanding obligations, but it is also true that the mill had just been completed and that when operated would show a first-rate net daily profit, and that it was compelled to cease operations because of a lack

of material to work upon. The mill had been built upon the property of the respondent, and the only cedar timber available for its use was that belonging to respondent. Under the contract between the parties, the respondent contended that it was not obliged to furnish the cedar timber, while the appellant claims that the contract never would have been entered into and the mill constructed without the understanding that the respondent was to provide the timber. While the contract is not explicit upon this point, in view of the entire situation, and giving the language contained in the contract its reasonable interpretation, it would seem that the appellant's contention is correct, and that the difficulties which the respondent now asserts gave it the right to early foreclosure were circumstances occasioned by the respondent's breach of its contract with the appellant. This contract, among other things, provides:

"First party shall at no time be required to furnish logs or bolts to second party when second party has on hand 200,000 feet of logs or 200 cords of bolts. In such event first party may sell excess cedar timber and bolts to third parties. First party shall deliver all cedar logs and bolts on cars on the track of the second party, and first party shall unload all thereunder, or where said logs or bolts are carried by the Skookumchuck river, same shall be delivered by first party to boom of second party.

"(4) Second party shall not be required at any time to accept the delivery of cedar timber or logs hereunder when the amount of his boom, together with the amount of his mill, shall, in the case of cedar logs exceed 200,000 feet, or in case of shingle bolts, exceed 200 cords. Second party shall be liable for loss of cedar timber or bolts after the same are delivered to the boom of second party, or if shipment is made by rail, at shingle mill of second party.

"(5) Second party shall use or put at its shingle mill no timber furnished by third parties, excepting

where first party is unable to furnish sufficient timber or logs to keep second party's shingle mill in operation. In the event second party is required to cut timber or bolts of third parties, second party shall notify first party at least one day in advance of his proposal so to do, and also notify first party at least one day in advance of his resumption of cutting first party's timber or bolts. Should second party receive timber or bolts from third parties the same shall be kept separate from logs or bolts furnished by first party.

"(6) Second party shall furnish each day to first party a statement of all shingles cut during the preceding day. . . .

"(8) If timber furnished by first party is sufficient and first party so requires, second party shall operate its mill double.

"(9) Second party shall pay to first party one-half of all moneys received from sale of shingles made from timber furnished by first party, including one-half of all underweights, such payment to be made to first party as soon as received by second party. Second party shall prepare invoices for all shingles manufactured from timber and bolts furnished by first party and sold by second party, and first party shall mail such invoices to purchasers. Second party shall sell to no persons, firms or corporations whose financial standing is unsatisfactory to first party, and only upon terms of payment satisfactory to first party."

There seems to be no other view to take of this contract than that it was one contemplating and calling for the furnishing of cedar by the respondent in order that appellant could conduct its operations. Accepting this view of the contract, and under the testimony, the respondent was not entitled to institute this action at the time at which it was begun, and the judgment of the lower court is therefore reversed.

CHADWICK, C. J., concurs.

MAIN, J. (concurring)—I am unable to find in the contract between the parties to this action any provision which imposes upon the respondent the duty or obligation of furnishing logs or shingle bolts to the appellant. It seems to me that the contract is carefully drawn to avoid the imposition of such a duty.

The fact that the respondent failed to furnish logs or shingle bolts sufficient to keep the mill in operation may be taken into consideration as bearing upon the good faith of the respondent in attempting to foreclose upon its mortgage.

I therefore concur in the result.

TOLMAN, J., concurs with MAIN, J.

MITCHELL, J. (dissenting) — I am inclined to the opinion of Judge Main that the contract imposes no duty upon the respondent to furnish logs or shingle bolts. But, independent of that consideration, there was a breach of the warranty contained in the mortgage, at the time it was given, because a large and substantial part of the mill machinery necessary to the operation of the mill did not belong to the appellant. In addition, at the time respondent refused to proceed further with the contract, and for some time prior thereto, appellant was sorely pressed and threatened with immediate litigation at the instance of creditors whose claims were overdue and beyond the ability of the appellant to pay. Its condition was one of insolvency. As was said in *Nixon v. Hendy Machine Works*, 51 Wash. 419, 99 Pac. 11, followed in *McKnight v. Shadbolt*, 98 Wash. 665, 168 Pac. 473:

"The evidence plainly shows that it was insolvent in that it was not able to pay its debts in due course of business, and this is the test of insolvency adopted by this court where the rights of creditors are involved."

In such circumstances, respondent was within its rights in the protection of its property to decline to furnish cedar timber, without such conduct constituting any cause for complaint against it.

While possibly not important, it may be noticed that, by the provisions of the first portion of paragraph 5 of the contract, appellant is protected in its right to purchase timber from third parties if necessity arises.

The judgment of the trial court should be affirmed.

ON REHEARING.

[*En Banc.* February 9, 1920.]

PER CURIAM.—Upon a rehearing *En Banc*, a majority of the court adhere to the opinion heretofore filed herein, and for the reasons there stated, the judgment of the trial court is reversed.

[No. 15269. Department Two. May 31, 1919.]

L. B. SWAFFORD, *Respondent*, v. HARRY LEVINE *et al.*, *Appellants*.[1]

APPEAL (414)—REVIEW—VERDICT. The verdict of a jury upon a direct conflict of fact will not be disturbed on appeal.

Appeal from a judgment of the superior court for King county, Hall, J., entered December 6, 1918, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Cassius E. Gates, for appellants.

Flick & Paul, for respondent.

HOLCOMB, J.—Respondent Swafford was employed, as he alleges, from January 15 to May 15, 1916, in performing certain services for appellant Levine. For

[1]Reported in 181 Pac. 682.

these services, he alleges, it was agreed that he was to receive $200 a month, and for the failure of appellant to pay such sum, he brought this action on account of balance of wages and expenses due him. Appellant defended in the court below on the ground of payment and release, and in support of that contention, presented the following purported receipt:

"Agreement

"For and in consideration of $153 to me in hand paid this day by the Carnation Lumber & Shingle Company, L. H. Burnett and Harry Levine, I, the undersigned do hereby release and discharge the said Carnation Lumber and Shingle Company, a corporation, L. H. Burnett and Harry Levine, from any and all claims of any and every kind whatsoever, whether for money or otherwise, which I have or might have against said company and individuals.

"Signed at Seattle, Washington, this 6th day of March, 1917.

"Witnessed. (Signed) L. B. Swafford."

The case was tried to the court with a jury, and resulted in a verdict for the plaintiff in the sum of $670.

The gist of the respondent's claim in the court below was that he was employed to look up mill sites, to cruise lands, and to select machinery for a proposed shingle mill, location of which had not then been determined upon. It is admitted that, after going over various tracts, appellant Levine took an option on a mill and certain timber adjacent, on the recommendation of Swafford, which option was superseded by a lease of the mill by a corporation in which Levine was virtually a half owner.

Save for this general outline, the evidence is in direct conflict. As to the receipt above mentioned, Swafford made two assertions, first, that it was fraudulently obtained; and second, that the instrument had

been plead in another suit between the same parties, and the amount therein deducted from the judgment awarded Swafford, and hence could not be properly used as an offset in this cause. The jury apparently found as to the fact, and, as we have seen, rendered verdict for Swafford with knowledge of this instrument and the diverse evidence regarding same on behalf of the parties.

There is nothing before us but disputed facts, and we shall not presume to disturb the findings of a jury which heard and saw the witnesses. The position of this court has been very definitely stated upon the question of reviewing the findings of a jury in a conflict of fact, and we shall not depart from that position in this case. *McKenzie v. North Coast Colliery Co.*, 55 Wash. 495, 104 Pac. 801, 28 L. R. A. (N. S.) 1244; *Merrill v. Stevens & Co.*, 61 Wash. 28, 112 Pac. 353, Ann. Cas. 1912B 1011; *Auwarter v. Kroll*, 89 Wash. 347, 154 Pac. 438; *Willett v. Seattle*, 96 Wash. 632, 165 Pac. 876; *Gray v. Hickey*, 97 Wash. 278, 166 Pac. 625.

Judgment on the verdict will be affirmed.

CHADWICK, C. J., MOUNT, FULLERTON, and PARKER, JJ., concur.

[No. 15346. Department One. May 31, 1919.]

CHARLES SIMPSON, *Appellant*, v. A. L. BROWN *et al.*, *Respondents*.[1]

MASTER AND SERVANT (110-112) — CONTRIBUTORY NEGLIGENCE — KNOWN DANGERS. An experienced farm hand, familiar with the conditions, cannot recover for injuries sustained where, after due consideration, he attempted to drive a horse and wagon under an elevated pipe, mistakenly judging that there would be sufficient clearance when, as he approached it, he could have protected himself by ordinary care and observation.

TRIAL (31, 32)—REOPENING CASE. In an action for injuries sustained in driving under an elevated pipe where there was not sufficient clearance, it is not an abuse of discretion to refuse to open the case for further evidence and continue the hearing to show the height of the pipe.

Appeal from a judgment of the superior court for Thurston county, Wilson, J., entered November 19, 1918, upon granting a nonsuit, dismissing an action in tort. Affirmed.

Hartman & Hartman, for appellant.

Peters & Powell, for respondents.

MITCHELL, J.—This is a suit for damages on account of personal injuries suffered by plaintiff while in the employment of defendants. The case was heard by the court without a jury, and at the close of plaintiff's case, the court granted defendants' motion for judgment, from which judgment this appeal is prosecuted.

There are two assignments of error: (1) In rendering judgment in favor of defendants; and (2) in denying plaintiff's motion to reopen the case and to continue the hearing for the purpose of submitting further evidence on his behalf.

Appellant was forty-eight years old, raised on a farm, and all his life accustomed to handling horses.

[1]Reported in 182 Pac. 88.

The accident in question occurred on respondents' farm, where appellant had been working for six months as foreman of the poultry department, with a number of persons under him. From a bunk house on the place to a slough from the Nisqually river near by, respondents maintained a six-inch sewer pipe, elevated on posts, eight to ten inches in diameter, set in the ground about ten feet apart. The pipe was in the open and the ground beneath was clear. Appellant was entirely familiar with the premises. The accident occurred about ten o'clock in the morning, in attempting to drive under the pipe. He was directed to go out into a field and get a lot of cabbage trimmings for the chickens. His own account of how he was injured is as follows:

"I hooked up the horse on Thursday morning and drove down into the field. I went around the bunk house after the load through the way that was traveled considerably, and that way looking kind of muddy, we went in and got one load and come out the same way, and then we went and fed that to the chickens and went back after the second load in the same way. While we was loading the second load, me and Mr. Garfield talked the matter over that the road was pretty muddy there,—it was bottom land and there looked to be several tracks under this pipe higher up where it was dry and we thought we could get under there, and the ground was a little bit raising there and we didn't clear the pipe. Q. Now state just how it occurred. A. Going through there the ground was high and I aimed to duck it this way. (Indicating) Q. Stoop down. A. Yes, on the seat of the high seated wagon, and the pipe caught me across the neck here and broke me down, and as I remember, Mr. Garfield dropped down on the shaft to save himself. I didn't have time to and he hollered whoa to the horse and the horse stopped, and when I was pinned under the pipe he backed the wagon to clear me. I didn't remember any-

thing more for a few seconds until I come to and seen the boys there taking me off the wagon."

This was a perfectly plain situation. An experienced farm-hand and teamster attempted to drive a horse, known to him to be docile and manageable, under a visible six-inch pipe, over smooth ground, the possibility of the accomplishment of which he had just considered and discussed with his helper, Mr. Garfield.

Of course, there was not sufficient space under the pipe to drive in safety, but the danger was open and apparent to the senses and, as appellant approached it, he could have failed to protect himself only by want of ordinary care and observation. Failure to observe such care precludes any right of recovery. 3 Labatt, Master and Servant (2d ed.), page 3026, § 1144; *Jennings v. Tacoma R. & Motor Co.*, 7 Wash. 275, 34 Pac. 937; *Krickeberg v. St. Paul & Tacoma Lumber Co.*, 37 Wash. 63, 79 Pac. 492; *Jock v. Columbia & Puget Sound R. Co.*, 53 Wash. 437, 102 Pac. 405.

Upon concluding the arguments on the motion to dismiss the case, it appearing there was a dispute between counsel as to what the proof showed, and possibly some slight uncertainty in the proof, as to the height of the pipe above the ground, appellant asked leave to introduce further evidence in that respect; and then asked for a continuance for that purpose, upon the statement by counsel for respondents that their witness, who had been present during the trial, prepared to testify upon that matter, was absent, having left immediately upon hearing both parties had rested in the introduction of evidence.

The court denied the motions, and clearly without any abuse of discretion in doing so.

Judgment affirmed.

CHADWICK, C. J., TOLMAN, MAIN, and FULLERTON, JJ., concur.

[No. 15362. Department One. May 31, 1919.]

NETTIE HOWELL, *Appellant*, v. L. A. DUNNING, *Respondent*.[1]

APPEAL (288) — STATEMENT OF FACTS — EXTENSION OF TIME FOR FILING—EXCUSE FOR DELAY. Failure to file a statement of facts within thirty days is excused, and an application for an extension of time, made within the sixty days when an appeal could have been taken, should have been granted, and a proposed statement filed within the ninety days permitted by an extension should have been received and certified, where appellant's attorney was quarantined at his home during an epidemic and thereby prevented from acting earlier.

SAME (288, 311)—STATEMENT OF FACTS—EXTENSION OF TIME—COMPELLING ALLOWANCE. Under Rem. Code, § 1730-8, appellant, erroneously refused an extension of time for filing a proposed statement of facts, may proceed by motion in the supreme court to obtain an extension of time and direction to the lower court to certify a statement; or such motion will be considered as an application for a writ of review.

Motion filed in the supreme court May 5, 1919, for an order permitting the filing of a statement of facts, and to have the same certified. Granted.

Moye Wicks and *Crandell, Williams & Crandell*, for appellant.

R. M. Dye, for respondent.

MOUNT, J.—This is an application, by motion in this court, for leave to file a statement of facts in this case, now on appeal, and have the statement returned to the superior court for certification.

The facts are as follows: A judgment was rendered in the superior court on the 18th day of October, 1918. A motion for new trial was filed on the 19th day of October, 1918. This motion was overruled on the 4th day of February, 1919. No proposed statement of

[1]Reported in 181 Pac. 697.

facts was filed within the thirty days. Notice of appeal, dated April 29, 1919, was filed on April 30, 1919, and served on May 1, 1919, and on May the 1st the appeal bond was filed. On the 3d day of April, 1919, counsel for appellant filed a motion in the superior court for an extension of time within which to file a statement of facts. At that time, a showing was made to the court to the effect that the family of counsel for the appellant was attacked by influenza, an epidemic which was then raging in the city of Spokane, where counsel lived; that he was, by reason thereof, quarantined in his home until after the expiration of the thirty-day period within which the statement of facts might be filed; and, for that reason, the statement of facts was not filed within the thirty days, but was served and offered for filing, and was actually filed, on the 1st day of May, 1919.

These facts are all shown by the record on appeal in this court. It will be noticed that the motion for an extension of time to file a statement of facts was served and filed within sixty days after the motion for new trial had been denied, and within the time when an appeal could be taken, and that a proposed statement of facts was served, and actually filed, within ninety days. The trial court denied the motion for an extension of time, and the appellant has now moved the court to be permitted to file the statement of facts and to have the same certified under the provisions of Rem. Code, § 1730-8.

We think it is evident that the appellant's counsel had a good excuse for not filing the statement of facts within the thirty days, as he was in quarantine and not permitted to leave his house. Afterwards, well within the ninety-day period, he offered for filing, and actually filed and served, his proposed statement of facts. We are satisfied that the trial court, under these cir-

cumstances, should have permitted the appellant to file her statement of facts, and should have certified the same, because no amendments were offered thereto. In the case of *Universal Motor Co. v. McGeorge,* 104 Wash. 344, 176 Pac. 331, this court refused to permit a statement of facts to be filed under the procedure adopted here, because the statement of facts was not filed, or offered to be filed, within the ninety-day period to which an extension of time might have been granted; but we think it is plain that, where the statement of facts is offered for filing and a good excuse is given for not filing the same within the thirty-day period, the trial court in fairness should extend the time to the extent of ninety days from the final judgment.

Counsel for the respondent insists that the court here has no jurisdiction to grant this order upon motion; and cites cases to the effect that the remedy is by writ of certiorari to review the order of the lower court. We have held that certiorari is a proper remedy; but we are of the opinion that, under Rem. Code, § 1730-8, the remedy by motion in this court is also a proper remedy, and, if not, that the application here will be treated as an application for review. It is true the trial court is not made a party to this proceeding, but the respondent is the only party interested in the matter, and is here represented and heard as fully as though the trial court was made a party respondent.

The motion for an order permitting the appellant to file her statement of facts in the case, and to have the same certified, is therefore granted; and the clerk of this court is instructed to return the statement of facts to the superior court for proper certification.

CHADWICK, C. J., MITCHELL, MAIN, and HOLCOMB, JJ., concur.

[No. 2. *En Banc.* June 4, 1919.]

In the Matter of the Proceedings for the Disbarment of H. N. MARTIN.[1]

ATTORNEY AND CLIENT (7)—DISBARMENT—GROUNDS. An attorney should be disbarred where it appears that he induced a client to give him a mortgage which he was to hold for the client's benefit, but which he sold to a *bona fide* purchaser, appropriating the proceeds, that he received money for services which he falsely represented he performed, and that in several other transactions he obtained possession of money belonging to his clients or associates and wrongfully appropriated and refused to account for the same.

Proceeding filed in the supreme court December 3, 1918, for the disbarment of an attorney, upon findings of the state board of law examiners. Judgment of disbarment.

The Attorney General and *R. M. Burgunder, Assistant,* for the state.

Cannon & Ferris, for accused.

MITCHELL, J.—This is a proceeding for the disbarment of H. N. Martin, an attorney and counselor at law in this state. He has been charged with unprofessional conduct constituting moral turpitude. A hearing was had in August, 1918, before the state board of law examiners, whose findings, conclusion, and recommendation, with all the evidence in the case, have been reported for review by this court, in accordance with its rules and the provisions of chapter 115, Laws of 1917, page 421. The defendant filed written objections to the findings, conclusion, and recommendation of the state board of law examiners, and the cause has been argued and submitted to this court.

The findings, conclusion, and recommendation of the board are as follows:

[1]Reported in 181 Pac. 880.

"FINDINGS: (1) That H. N. Martin is now, and at all times mentioned herein has been, a duly qualified attorney at law admitted to [practice in this state].

"(2) That, in the month of September, 1916, one M. H. Sorell employed H. N. Martin as his attorney to defend him in a criminal action pending against him in the superior court of Grant county, Washington; that it was agreed between Martin and Sorell and wife that the attorney fee in said case was to be the sum of $1,000 for services in the superior court; that said Sorell did not have the sum of $1,000 in cash with which to pay said attorney fee, and it was necessary for him to place a mortgage upon certain property in order to secure the money, and in connection therewith the said H. N. Martin suggested to and advised said Sorell that an additional mortgage of $10,000 be made on all of Sorell's property not already covered by mortgages, in order to protect Sorell in case a judgment for damages was rendered against him in a civil action then pending in the same court; that, pursuant to said advice from said H. N. Martin, the said M. H. Sorell and Emma Sorell, his wife, on the 15th day of September, 1916, executed a mortgage in favor of H. N. Martin on certain property owned by them to secure the payment of a note for $10,000 payable one year from date; that, prior to and at the time of the execution of said note and mortgage, it had been agreed between Martin and Sorell and wife that the mortgage should not be placed of record unless Sorell requested Martin to do so, and in that event Martin agreed to release all or any part of the land included in said mortgage if Sorell wished to sell or mortgage any of the property, or if such request was made for any other purpose.

"(3) That thereafter, and on the 22d day of September, 1916, said Martin endorsed said note and delivered it to the Davenport National Bank of Davenport, Washington, and thereafter and on the 20th day of October, 1916, the said H. N. Martin sold and assigned said mortgage to said bank for a recited consideration of $5,000; that, at the time of said assignment, said H. N. Martin fraudulently represented to

said bank that said mortgage for $10,000 had been given to him in payment of an attorney fee and was *bona fide;* that, in fraud of the rights of said Sorell and without his knowledge or consent, said mortgage was delivered to said bank and recorded by it on the 23d day of October, 1916; that said Martin fraudulently sold said mortgage and appropriated the proceeds of the sale or assignment to his own use, and has refused to account therefor to the said Sorell, or to secure its release and satisfaction, in whole or in part, or to reduce the amount of said mortgage by proper credits on the note or otherwise, although repeated requests have been made to said Martin by Sorell.

"(4) That, a short time after the execution of said $10,000 mortgage, and on or about the 20th day of October, 1916, the said M. H. Sorell mortgaged part of his land for the sum of $1,000 and paid said amount to said H. N. Martin, in full for his services in the criminal action; that the assignment of the note and mortgage by Martin to the bank was accomplished by falsely representing to the bank its consideration, and was done for the purpose of defrauding said Sorell of his property and for the personal gain of said Martin.

"(5) That, on November 6, 1913, in the case of D. C. Bonthius and wife against the Great Northern Railway Company, in the superior court of Lincoln county, cause No. 6060, a judgment was entered in favor of the plaintiffs, after a trial before Judge McCroskey of that county, in which action plaintiffs were represented by Martin & Wilson, as their attorneys; that, subsequent to the date of the judgment, the defendant appealed from the decision of the superior court to the supreme court of the state of Washington; that plaintiffs, through their son, C. Bonthius, arranged with H. N. Martin to represent them on said appeal and to write a brief for the supreme court in said action, and have the same printed, which Martin agreed to do; that the sum of $25 was paid to Martin to apply on the payment of printing the brief; that Martin failed to write or have printed a brief for the supreme court, and no brief was filed in this case for or on behalf of the plaintiffs, although said Martin repeatedly

told and wrote his clients that he was writing said brief; that a decision of the supreme court on the appeal was rendered on February 2, 1916, in which the judgment of the superior court was reversed, and the action of plaintiffs dismissed.

"(6) That, on or about November 9, 1915, suit was brought by D. C. Bonthius against the Great Northern Railway Company, wherein H. N. Martin acted as attorney for the plaintiff, in which judgment in the sum of $220 was sought for the killing of a two-year-old steer July 31, 1915, one three-year-old steer August 3, 1915, and the injury to one Durham bull calf six months old, and one Durham heifer calf six months old, all the property of plaintiff; that, on December 21, 1915, H. N. Martin, as attorney for plaintiff, and the attorneys for the railway company, entered into a written stipulation whereby the case was settled for $140; that subsequently H. N. Martin was paid the sum of $140 by the railway company in accordance with the stipulation; that this money was appropriated by Martin to his own use, and no accounting thereof has ever been made by him with D. C. Bonthius; that, at the time of the appropriation of said sum of $140 by said Martin, the said D. C. Bonthius was indebted to the firm of Martin & Wilson for services rendered and costs expended by them in previous litigation.

"(7) That, in the month of July, 1913, one Amanda W. Nichols employed the firm of Roche & Onstine, attorneys at law at Spokane, Washington, to cancel a deed and bill of sale and obtain a divorce for her, and thereafter one E. D. Reiter, an attorney, was associated with said firm of attorneys in said action, which was entitled: 'In the Superior Court of the State of Washington in and for the County of Spokane. Amanda W. Nichols, plaintiff, v. J. J. Nichols, defendant.'

"(8) That thereafter the attorneys above named served and filed a motion in said cause to require the defendant to pay a reasonable sum as alimony, suit money and attorney's fees, but prior to the hearing on said motion, the said H. N. Martin was entered as

one of her attorneys; that it was agreed by and between Roche & Onstine, E. D. Reiter and said Martin that the fees payable to Martin for the services rendered by him in the case should be paid directly to him by the plaintiff, and that he was to receive no part of the fees that were to become due to the other attorneys in the case, but that in the event that the court made any order in the action allowing attorney fees to the plaintiff therein, that the same would be divided equally between the attorneys, to wit: Mr. Martin one-third, Roche & Onstine one-third, and Reiter one-third.

"(9) That thereafter, on the 12th day of January, 1914, an order was made by the court in said case requiring the defendant to pay to the clerk of the court the sum of $50 suit money and $200 attorney fees; that said sum of $250 was paid to the clerk on the 20th day of January, 1914, and on the same day the said H. N. Martin demanded and received the same from the clerk; that said Martin kept all of said money for his own use and has made no accounting to said Roche & Onstine or E. D. Reiter for their share in said sum of $200, although repeated demands have been made for the payment of said money.

"(10) That thereafter the said E. D. Reiter assigned to Roche & Onstine his interest in said fee, and an action was instituted in the superior court of the state of Washington in and for Spokane county by said firm of attorneys against said H. N. Martin and the deputy clerk of Spokane county to recover their share of said $200 attorney fee; that said action was tried on the 9th day of June, 1916, and thereafter and on the 11th day of July, 1916, the court granted judgment in favor of Roche & Onstine and against said H. N. Martin in the sum of $130, having found in said case that said Martin had wrongfully received from the clerk all of said attorney's fees and had unlawfully appropriated the same to his own use, and had refused to pay said E. D. Reiter and said Roche & Onstine their share thereof, although often requested so to do; that, since the rendition of said judgment, the said H. N. Martin has failed to pay to said Roche & Onstine

their share of the attorney fee in said divorce action, as determined by the court, and has continued to unlawfully and wrongfully retain and appropriate said money to his own use.

"CONCLUSION: I. As conclusions of law in the foregoing findings of fact, the board finds that the acts and omissions of said H. N. Martin, as set forth in the first, second and fourth causes of action, constitute unprofessional conduct as an attorney at law and involve moral turpitude.

"RECOMMENDATION: I. The board recommends that on the first, second and fourth causes of action the said H. N. Martin should be disbarred from further practice as an attorney in the state of Washington and that his license to practice therein should be revoked."

We have examined the evidence and are satisfied that the findings, conclusion and recommendation of the state board of law examiners are justified and that defendant has forfeited his right to practice law in this state.

It is therefore ordered that defendant, H. N. Martin, be disbarred and his license to practice law in this state annulled.

FULLERTON, MAIN, PARKER, and MACKINTOSH, JJ., concur.

[No. 14942. *En Banc.* June 4, 1919.]

HAM, YEARSLEY & RYRIE, *Respondent,* v. NORTHERN PACIFIC RAILWAY COMPANY *et al., Appellants.*[1]

EMINENT DOMAIN (84) — COMPENSATION — MARKET VALUE. The fair and reasonable market value at the time of the trial is the basis for compensation in condemnation proceedings.

SAME (84). The market value is the price it will bring when offered for sale by one who desires but is not obliged to sell, and is bought by one under no necessity of buying.

SAME (80, 126, 136)—COMPENSATION—VALUE FOR SPECIAL USE—EVIDENCE—INSTRUCTIONS. In condemnation of property for a dam site which is improved by a dam impounding waters for irrigation, it is proper to show its condition, the uses to which it has been applied, and its availability and capacity for other uses, and whatever the improvements may add to its fair market value for all purposes, so that it is error to instruct that its value as a dam site cannot be considered; but the fact that it is needed for the particular object sought by the condemnation is not an element of the value.

SAME (78)—COMPENSATION—IMPROVEMENTS. In eminent domain proceedings, owners of a dam site impounding the waters of a lake, who, without any right to the waters, built a dam and storage works pending litigation over the right to the waters, acted at their peril and are not entitled to recover the cost price of their improvements as part of their damages, but are limited to the market value of their property, including whatever the improvements may add to its fair market value for any and all purposes at the time of the trial.

COSTS (45)—WITNESSES' FEES. It is an abuse of discretion to refuse to tax costs for witnesses who were present and competent to testify although, because of the manner in which the case was tried, they were not called upon to testify.

MOUNT, MAIN, and FULLERTON, JJ., dissent.

Appeal by defendants from a judgment of the superior court for Grant county, Hill, J., entered February 26, 1918, awarding damages in condemnation proceedings, after a trial to the court and a jury. Reversed.

[1]Reported in 181 Pac. 898.

Cannon & Ferris and *Williamson & Luhman*, for appellants.

Voorhees & Canfield and *Merritt, Lantry & Merritt*, for respondent.

HOLCOMB, C. J.—The chief question in this case is the proper measure of compensation and damages in a condemnation proceeding.

On September 9, 1913, judgment was entered in the superior court for Grant county whereby 16 and 2/10 acres of land on Moses Lake, in that county, were decreed subject to appropriation for a public use by the respondent, subject to the right of the respondent to acquire the same by condemnation, for the construction and maintenance of a dam site. That judgment was entered by direction of this court, culminating protracted litigation. See *State ex rel. Ham, Yearsley & Ryrie v. Superior Court*, 70 Wash. 442, 126 Pac. 945; *State ex rel. Grant Realty Co. v. Superior Court*, 76 Wash. 376, 136 Pac. 144; *State ex rel. Ham, Yearsley & Ryrie v. Superior Court*, 81 Wash. 690, 143 Pac. 310, and *Grant Realty Co. v. Ham, Yearsley & Ryrie*, 96 Wash. 616, 165 Pac. 495. Four years later, after the termination of the above mentioned litigation, a trial of the condemnation proceeding before the court, sitting with a jury, resulted in the assessment of damages in the sum of $85. Motion for a new trial upon the ground that the verdict was inadequate, and for error of law at the trial and for other reasons set forth in the motion was denied and verdict entered upon the judgment.

The principal errors assigned by the appellants are:

(1) The court erred in rejecting appellants' offer of testimony that "the land described in the petition and sought to be condemned by the petitioner for a

dam site is, by reason of its surroundings and natural advantages, peculiarly adapted for a dam site."

(2) The court erred in rejecting appellants' offer of testimony that the "fair market value of the land sought to be condemned, taking into consideration all of the uses to which the land is adaptable, including that of a dam site, is from forty to sixty thousand dollars."

(3) The court erred in rejecting appellants' offer of testimony that a fair market value of the land sought to be condemned, with improvements located thereupon, is approximately the sum of forty-five thousand dollars.

(4) The court erred in rejecting appellants' offer of testimony as follows: that the defendant companies, subsequent to the date of the filing of notice of appropriation of the waters in Moses Lake by the petitioner, filed upon Moses Lake, in conformity with the laws of the state of Washington relative thereto, notice of appropriation of the waters of said lake for use both by storage and by diversion; that, pursuant to said notice of appropriation, and in due compliance with the law relative thereto, the defendants diligently and continuously prosecuted to completion the necessary works for the impounding and diversion of 48,000 acre feet of the waters of said lake by the construction of a dam upon the property sought to be condemned; that, by virtue of said dam which was constructed and is now upon the land sought to be condemned, the defendants have stored, are now storing, and in possession of approximately 48,000 acre feet of the waters which would otherwise have gone to waste; that they are the owners of 38,000 acres of irrigable land adjacent to and irrigable from the said Moses Lake with the waters so impounded in said lake; that

works have been constructed and completed for the irrigation of approximately 3,200 acres of said body of land, of which there is already reclaimed and being irrigated a considerable portion; that the petitioner proposes to immediately destroy the dam heretofore referred to as now existing on the property sought to be condemned, thereby taking of said dam site and injuriously affecting other property of the defendants, to wit, the said 48,000 feet of water now stored and impounded in said reservoir, and that a reasonable value of the property thus deprived of the defendants is the sum of $114,000.

(5) The court erred in rejecting appellants' offer of testimony that "the dam upon said property sought to be condemned cost the sum of $17,500, is in good condition and is serviceable."

(6) The court erred in rejecting appellants' offer of testimony "that the dam is in good condition, has not depreciated in value, and cannot be reproduced for a considerably larger sum."

Assignments numbered seven to eleven, inclusive, are that the court erred in giving instructions numbered 2, 3, 6, 7, 8.

Assignment twelve is that the court erred in refusing appellants' motion for a new trial.

Assignment thirteen is that the court erred in granting respondent's motion to retax costs.

Appellants state their proposition contended for on this appeal succinctly in their reply brief as follows:

(1) In a condemnation proceeding, can the owner show the value of his land for all purposes for which it is naturally adapted?

(2) In a condemnation proceeding, can an owner show market value of the land with the improvements existing at the time of trial?

(3) In a condemnation proceeding, can an owner show damage to other property injuriously affected by the taking of the specific property condemned?

(4) In a condemnation proceeding, is an owner entitled to witness fees for witnesses produced by him to testify to market value of his premises?

Appellants insist that this court must answer each of these questions in the affirmative, but that the lower court answered each of them positively in the negative.

All of these questions must be answered, abstractly, in the affirmative, and it remains only to be seen, concretely, whether, or to what extent, they were answered in the negative by the court below.

The respondent stated in its brief that the site contended for is the only practicable dam site for impounding the waters of the lake. Respondents contend, however, that appellants only offer, in connection with their offers to prove the value of the land and damages, was to prove the value of the land *in connection with the waters of Moses Lake.* The offer as shown in assignment of error number two and by the statement of facts is not such an offer; that offer was a clear and unequivocal offer to show that the fair market value of the land sought to be condemned, taking into consideration all the uses to which the land is adapted, including a dam site, is from $40,000 to $60,000, and the offer shown in assignment number three was that "the fair market value of the land sought to be condemned, with the improvements located thereon, is approximately the sum of $45,000."

The court instructed the jury (Instruction No. 4) that they were to "assess and allow to defendants for said land its fair and reasonable market value at the time of this trial, based on the evidence given in the case and upon your view thereof, and in conformity with all the instructions given you by the court." In

instruction number five the jury were instructed that the "market value as given in the instructions is the price which said real estate will bring when it is offered for sale by one who desires but is not obliged to sell it, and is bought by one who is under no necessity of having it." Instruction number six was that "in estimating the value of the real estate you may consider all of its capabilities and all of the uses to which it is applied, and for which it is adapted, but you shall not consider the fact, if you find such fact to be, of the unwillingness of the owner to sell or dispose of said property."

These instructions were all correct and in accord with our decisions and the almost universal decisions upon this question; but the court further instructed the jury (Instruction 7) that, in ascertaining the value of damage, they "must not take into consideration any special value which said property may have to the petitioner by reason of its necessity, but the market value as hereinbefore defined to you"; "*Nor should you take into consideration the value of defendants' property as a dam site.*" The court further instructed the jury that "the waters of Moses Lake, in front of the defendants' lands which are sought to be condemned in this proceeding, are navigable waters within the law, and the right to impound, store and use them is owned by the petitioner, and the defendants, by reason of the ownership of said lands abutting on said lake, would have no proprietary rights in any dam site upon which to construct a dam for the purpose of impounding and storing the waters of said Moses Lake, and would not be entitled to have the value of such dam site considered in estimating the value of the lands, as they have no interest in and to the waters of Moses Lake or any right to impound and store the same." In instruction number seven the respondent

insists that the trial court adhered to the rule which held to the market value for all purposes, and clearly, specially and unmistakably told the jury that, in their determination of the value of the land, they could consider its adaptability for a dam site. This is certainly not correct when we find in the instruction that the court told the jury they were not to take into consideration the value of the land for a dam site.

This court has always adhered to the rule that the market value at the time of trial is the basis of compensation in condemnation proceedings: *Seattle & M. R. Co. v. Murphine,* 4 Wash. 448, 30 Pac. 720; *Seattle & M. R. Co. v. Roeder,* 30 Wash. 244, 70 Pac. 498, 94 Am. St. 864; *In re Westlake Avenue,* 40 Wash. 144, 82 Pac. 279; *Grays Harbor & P. S. R. Co. v. Kauppinen,* 53 Wash. 238, 101 Pac. 835; *Columbia & Cowlitz River Boom & Rafting Co. v. Hutchinson,* 56 Wash. 323, 105 Pac. 636; *Distler v. Grays Harbor & Puget Sound R. Co.,* 76 Wash. 391, 136 Pac. 364; *Tacoma v. Nisqually Power Co.,* 57 Wash. 420, 107 Pac. 199; *Seattle, Port Angeles & Lake Crescent R. Co. v. Land,* 81 Wash. 206, 142 Pac. 680; *King County v. Seattle Cedar Lumber Mfg. Co.,* 94 Wash. 84, 162 Pac. 27, L. R. A. 1917C 1184.

Lewis on Eminent Domain (2d ed.), vol. 2, § 479, lays down the rule as follows:

"Value for Particular Uses.—The market value of property includes its value for any use to which it may be put. If, by reason of its surroundings, or its natural advantages, or its artificial improvements, or its intrinsic character, it is peculiarly adapted to some particular use, all the circumstances which make up this adaptability may be shown, and the fact of such adaptation may be taken into consideration in estimating the compensation. Some of the cases hold that its value for a particular use may be proved, but the proper inquiry is, what is its market value in view of any use to which it may be applied and of all the uses in view to which it is adapted?"

In *Boom Co. v. Patterson,* 98 U. S. 403, the United States supreme court say:

"In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be, what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted, that is to say, what is it worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can readily be estimated.

"So many and varied are the circumstances to be taken into account in determining the value of the property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future.

"The position of the three islands in the Mississippi, fitting them to form, in connection with the west bank of the river, a boom of immense dimensions, capable of holding in safety over twenty millions of feet of logs, added largely to the value of the lands. The boom company would greatly prefer them to more valuable agricultural lands, or to lands situated elsewhere on the river; as, by utilizing them in the manner proposed, they would save heavy expenditures of money in constructing a boom of equal capacity. Their adaptability for boom purposes was a circumstance,

therefore, which the owner had a right to insist upon as an element in estimating the value of the land."

Lewis on Eminent Domain (3d ed.), vol. 2, § 707, says:

"So it is proper to show that property possesses a peculiar value for railroad purposes, for dock purposes, for a mill site, for a ferry, for market gardening, for raising cranberries, for warehouse purposes, or for a bridge site."

In 10 R. C. L. § 114, page 131, the rule is stated as follows:

"Value for Special Use.—While market value is always the ultimate test, it occasionally happens that the property taken is of a class not commonly bought and sold, as a church, or a college, or a cemetery, or the fee of a public street, or some other piece of property which may have an actual value to the owner, but which under ordinary conditions he would be unable to sell for an amount even approximating its real value. As market value presupposes a willing buyer, the usual test breaks down in such a case, and hence it is sometimes said that such property has no market value. In one sense this is true; but it is certain that for that reason it cannot be taken for nothing. From the necessity of the case the value must be arrived at from the opinions of well informed persons, based upon the purposes for which the property is suitable. This is not taking the 'value in use' to the owner as contradistinguished from the market value. What is done is merely to take into consideration the purposes for which the property is suitable as a means of ascertaining what reasonable purchasers would in all probability be willing to give for it, which in a general sense may be said to be the market value.

"Value from Expected Public Use: The value of the land taken to the party taking it is not the test of what should be paid, nor should the fact that the land is desired or needed for a particular public use be considered when it is taken for that use. If, however, entirely apart from the fact that the property was taken

for a particular use, it appears that it was exceptionally adapted and available for such a use, as for example, for a municipal water supply, or for a railroad, or for a bridge, and the necessity for such use was so imminent as to add something to the present value in the minds of possible buyers, that element may be considered in determining the fair market value."

In 41 L. R.A. (N. S.) at page 838, it is said:

"It [value] includes every element of usefulness and advantage in the property. If it be useful for agricultural or for residence purposes, if it has adaptability for a reservoir site or for the operation of machinery, if it contains a quarry of stone or a mine of precious metals, if it possesses advantage of location or availability for any useful purpose whatever, all these belong to the owner, and are to be considered in estimating its value. It matters not that the owner uses the property for the least valuable of all the ends to which it is adapted, or that he puts it to no profitable use at all. All its capabilities are his, and must be taken into the estimate.

"This does not mean that all the capabilities are to be priced separately and the aggregate put down as the true value, for they do not exist independently of each other, and cannot all be realized at the same time; nor will it do to restrict the estimate to any one of them, because in one view that would exclude the other elements altogether, and in another view it would tend to make the degree of benefit to the party appropriating and condemning for a particular purpose the real measure of value, which is never allowable." *Southern R. Co. v. Memphis,* 126 Tenn. 294, 148 S. W. 662, 41 L. R. A. (N. S.) 828, 838.

Lewis on Eminent Domain (2d ed.), vol. 2, at page 1056, says:

"The conclusion from the authorities and reason of the matter seems to be that witnesses should not be allowed to give their opinions as to the value of property for a particular purpose, but should state its market value in view of any purpose to which it is adapted.

The condition of the property and all its surroundings may be shown, and its availability for any particular use. If it has a peculiar adaptation for certain uses, this may be shown, and if such peculiar adaptation adds to its value the owner is entitled to the benefit of it. But, when all the facts and circumstances have been shown, the question at last is, what is it worth in the market."

See, also, *Currie v. Waverly & N. Y. B. R. Co.*, 52 N. J. L. 381, 20 Atl. 56, 19 Am. St. 452.

His Honor, the trial judge, adopted the theory of the respondent that the rule announced in *Grays Harbor Boom Co. v. Lownsdale*, 54 Wash. 83, 102 Pac. 1041, 104 Pac. 267, applies to this case and framed his instruction in conformity with the instruction given in that case. We later pointed out, however, in *Columbia & Cowlitz River Boom & Rafting Co. v. Hutchinson*, 56 Wash. 323, 105 Pac. 636, that in the *Lownsdale* case the claimant against whom the condemnation was instituted was not the owner of the shore land with the accompanying littoral and riparian rights, and there was not sought to be appropriated any part of the upland further than for a right of way with possible consequent erosion caused by the use of the shore land and upland, and that in a case where, as in the *Hutchinson* case, the respondents were the owners of the shore land as well as the upland and the appurtenant littoral and riparian rights that attach to such lands in this state, and where for the successful operation of the boom it was necessary to use a part of the upland, that the availability of the land as a boom site should be taken into consideration, and in that case such availability was taken into consideration and approved by this court. In a note by the editor to the case of *McGovern v. New York*, 46 L. R. A. (N. S.) 391, at page 393, it is pointed out that the *Grays Harbor*

Boom Co. v. Lounsdale case, *supra,* does not depart from the general rule heretofore stated. The case was analyzed and it was pointed out that the owner of the land there involved, which abutted on the river and shore, had no proprietary right in any boom site, and hence was not entitled to have its value for a boom site considered in estimating the value of the land. That the court does not intend, by its decision, to hold that the owner of land which was available for the purpose for which it was sought to be condemned was not entitled to have its value for that purpose considered as an element to establish the market value, is made clear by a later decision wherein an instruction to the jury was sustained to the effect that the jury, in making up their verdict, should take into consideration the value of the land as a boom site, although it was being condemned to be used for that purpose; citing *Columbia & Cowlitz River Boom & Rafting Co. v. Hutchinson,* 56 Wash. 323, 105 Pac. 636. The distinction between the cases as here made was pointed out by the editor in the foregoing note. It is true that the owner is not permitted to take advantage of the necessities of the condemning party, but neither can the condemner obtain something of value for nothing. Under the rule fixing the market value at the time of taking, obtaining in this state, and in determining that value, it is proper to show the condition of the property, its surroundings, the uses to which it has been applied, and its capacity for other uses, including that to which it is sought to be applied, in estimating its value, but no showing may be made of its value for any special use; the value of the use for which it is sought may be more or less than its market value. *Black River & M. R. Co. v. Barnard,* 9 Hun (N. Y.) 104; *Oregon R. & Nav. Co. v. Taffe,* 67 Ore. 102, 134 Pac. 1024, 135 Pac. 332, 515.

A proper theory for the trial court to proceed upon and admit and reject evidence and instruct the jury is the rule as stated in *Brack v. Mayor etc. of Baltimore,* 125 Md. 378, 93 Atl. 984, Ann. Cas. 1916 E 880, as follows:

"The rule is that the market value of the land is to be estimated with reference to the uses and purposes for which it is adapted, and that any special features which may enhance its marketability may properly be considered. But the fact that the land is needed for the particular object sought by the condemnation is not to be regarded as an element of the value to be ascertained. The question is not what the property is worth to the condemning party, but what could probably be realized from its sale to any purchaser who might desire it for any or all of the purposes for which it is available."

See, also, 15 Cyc. 757; *Sargent v. Town of Merrimac,* 196 Mass. 171, 81 Atl. 970, 124 Am. St. 528, 11 L. R. A. (N. S.) 996; *Board of Trade Tel. Co. v. Darst,* 192 Ill. 47, 61 N. E. 398, 85 Am. St. 288, 291, note.

We are, therefore, of the opinion that the trial court was in error in rejecting appellants' offers under assignments 1, 2 and 3, and in instructing the jury as in instruction number seven.

We are of the opinion, however, that the court properly rejected the offers stated in assignments number 4, 5 and 6. These appellants and additional claimants who are parties to the proceeding were held in the original case (*State ex rel. Ham, Yearsley & Ryrie v. Superior Court,* 70 Wash. 442, 126 Pac. 945) to have no right, title or interest in the waters of Moses Lake as riparian owners, or as owners of the shore land and upland, and they were subsequently held to have no right by appropriation superior to that of the petitioner in this case; and we held in the subsequent case of *Grant Realty Co. v. Ham, Yearsley & Ryrie,* 96 Wash.

616, 165 Pac. 495, that the petitioner had proceeded in good faith and was entitled to the appropriation of the waters and to condemn land and property for the storage and diversion thereof. We there held that, so long as their proceedings were in good faith and diligently prosecuted, their rights related back to the time of their appropriation, and thereby they acquired prior, superior, and exclusive rights as against these parties. In the face of what we have adjudged to be the prior and superior rights of the petitioner, these claimants have proceeded to erect storage and diversion works which we must hold they did at their own peril. While it is true that they are secondary appropriators or users, their works may be of no value whatever to prior appropriators and may not fit into their project at all, and it would be unfair to compel the respondent to pay the cost price of improvements or the value of water alleged to be stored, in the face of respondent's rights, as compensation or damages in order to acquire the dam site for petitioner's own storage and diversion works. Appellants must be limited to the market value of the dam site which is appropriated by the petitioner, that market value to include the availability of the site by reason of its surroundings and natural advantages and whatever improvements may add to its fair market value for any and all purposes at the time of trial and not as erected for the benefit of the appellants for their irrigation works.

On the matter of retaxing the costs, appellants claim witness fees for A. L. Pettigrew, who is one of the appellants, and certainly is not entitled to witness fees. They also claim witness fees for R. K. Tiffany and mileage from Yakima; T. A. Noble and mileage from Yakima; W. R. Hill and mileage from Seattle, and John D. Anderson and mileage from East Farms. On the motion to retax costs, the respondent filed an affi-

davit to the effect that none of the above named persons had any qualification to testify as to the market value of real estate sought to be condemned in this action, or of other real estate in the vicinity of Moses Lake, nor were said parties, or either of them, present at the place of trial at the time thereof for the purpose of testifying as to such values, but each and all of them were called for the purpose of testifying as to the value of the real estate as a dam site in connection with the waters of Moses Lake and as to the value of the dam then standing thereon to the claimants, and as to the value of the dam site and dam in connection with the waters of Moses Lake and the rights of the petitioner therein and its project thereon. All of these matters were denied by the appellants in their counter-affidavit, and it was averred that these witnesses were qualified, and called for the purpose of testifying, as witnesses, to the market value of the premises, taking into consideration all the purposes for which they were adaptable and which would go to make up such value in the open market. Such being the state of the record, the trial court abused its discretion in disallowing witness fees in regard to the above mentioned witnesses, in view of our decision herein, even though, because of the manner in which the case was tried, they did not testify. *Low v. McDonald,* 90 Wash. 122, 155 Pac. 748.

The judgment is reversed, and the cause remanded with instructions to the trial court to proceed in conformity with this decision.

MITCHELL, TOLMAN, PARKER, and MACKINTOSH, JJ., concur.

MOUNT, J. (dissenting)—In my opinion, there was no error in the trial. The judgment should be affirmed. I therefore dissent.

MAIN and FULLERTON, JJ., concur with MOUNT, J.

[No. 15202. *En Banc.* June 12, 1919.]

CORA ALLEN, *by her Guardian etc., Respondent,* v. CHRIST SCHULTZ *et al., Appellants.*[1]

MUNICIPAL CORPORATIONS (380, 389)—STREETS—AUTOMOBILES—VIOLATION OF ORDINANCE—EVIDENCE. The driver of an automobile, driving on the wrong side of the street contrary to law, who struck a passenger alighting from a street car, cannot claim an emergency excusing his act, where it appears that the accident was due to his own negligence in approaching the street intersection under the erroneous assumption that the street car was not going to stop at its regular stopping place.

SAME (379, 389). In such a case, the emergency does not excuse his negligence in operating his automobile with the brakes out of order, when otherwise he could have stopped in time to have avoided the accident, since he was bound to anticipate the necessity of emergency stops and keep his brakes in order.

APPEAL (413)—REVIEW—VERDICTS. The verdict of a jury in a personal injury case will not be set aside as excessive if supported by plaintiff's evidence.

PLEADING (192, 196, 202)—WAIVER OF OBJECTIONS—TRIAL WITHOUT REPLY. The failure to deny an answer alleging contributory negligence is waived where the case was tried out on the merits as if issue had been duly joined without any timely objection.

Appeal from a judgment of the superior court for Spokane county, Hurn, J., entered February 27, 1918, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Affirmed.

S. L. Americus (F. C. Highsmith, of counsel), for appellants.

Losey & Newton, for respondent.

FULLERTON, J.—The respondent Cora Allen, while alighting from a street car on one of the streets of the city of Spokane, was struck and injured by an automobile owned by the appellant Christ Schultz and

[1]Reported in 181 Pac. 916.

driven by the appellant Jake Schultz. She brought this action to recover for the injuries received, averring in her complaint that the accident was the result of negligence on the part of the driver of the automobile. Negligence was denied in the answer of the appellants and a trial had on the issues thus framed, which resulted in a verdict and judgment in favor of the respondent. On their appeal, the appellants assign that the court erred in its instructions to the jury, erred in refusing to grant their motion for a new trial, and erred in entering judgment against the appellant Christ Schultz.

There are certain facts surrounding the transaction which are undisputed. The accident causing the injury occurred at the intersection of Howard street and Augusta avenue, in the city named. Howard street at this place extends north and south, is sixty feet in width, and has upon it a double street car track upon which is operated the street cars of the Washington Water Power Company. Augusta avenue is thirty feet wide and crosses Howard street at a right angle. On the square adjoining Howard street on the east and Augusta avenue on the north is a high school building in which the respondent was a student. The street intersection is a usual stopping place for the cars of the street car company named, and is the usual alighting place for students of the high school who use the cars as a means of transportation to the school. On the morning of the accident, the respondent, with other students of the high school, came in on a car from the north. The car stopped at the intersection of the streets and one of the high school students got off. The respondent followed, getting off the car backwards, and was struck by the fender of the appellant's automobile just as she had reached the ground and while she was still holding to

a stanchion on the side of the car steps. She was knocked down by the car, which passed on to her left, colliding before stopping with an automobile truck which stood some distance back of the end of the street car.

The automobile approached the street car from the west, coming along Augusta avenue, which has a down grade at that place. It was traveling near the center or to the right of the center of the avenue, and instead of turning to the right toward the front of the street car, turned to the left in an effort to pass the car at its rear end. The principal dispute in the evidence is over the speed of the automobile when it approached and attempted to go behind the street car, and the necessity for its turning in that direction.

The respondent's witnesses testified that the automobile approached the street car at a rather high rate of speed and was traveling at from fifteen to twenty miles per hour when it struck the girl. They also testified that the street car, on stopping at the street intersection, protruded into Augusta avenue about one-fourth of the distance across it, and that there was nothing to prevent the automobile from passing the street car at the front or from turning to the right and passing down the street on the right-hand side of the street.

The driver of the automobile testified, and in this he is corroborated by the two persons riding in the car with him, that the automobile approached the car at a slow rate of speed and was going no faster than four miles an hour when it turned to the left to pass the car. He further testified that the street car extended, when it stopped, almost, if not quite, across Augusta avenue, and that he was prevented from turning to the right because of an automobile which stood in Howard street near the front end of the street car

at the south side of Augusta avenue. He further testified that the street car approached the street intersection rapidly, so rapidly, in fact, that he thought it was going through without stopping, and that he thought, because of that fact, that he could slack up and go behind it, and that he was within about eight feet of it when it actually stopped. In explanation of the fact that he did not stop the automobile before striking the respondent, he testified that the brakes were not in good condition, being too loose to furnish sufficient pressure on the brake drums to stop the automobile. He also testified that, after the street car stopped, a passenger, a high school girl, got off the car ahead of the respondent, and that the respondent got off the car backwards. It was shown without dispute that the respondent had been a cripple for many years, compelled to wear a metal ankle brace, a fact which possibly explains her manner of alighting from the car.

The court instructed the jury that, by the undisputed evidence, the driver of the automobile was, at the time of the accident, driving the automobile on the left-hand side of the street, contrary to the ordinances of the city of Spokane, and that such an act constitutes negligence on the part of the driver, and that such negligence is imputed, as a matter of law, to the owner of the automobile; further instructing the jury that the only question for them to determine was the amount of damage, if any, the respondent sustained by being struck by the automobile.

It is upon these instructions that the appellants assign error. It is not contended that the driver of the automobile was not driving upon the left-hand side of the street when the accident occurred, nor is it contended that to so drive is not contrary to the city ordinance, but it is contended that negligence

does not necessarily follow from these conditions; that a driver of an automobile may, under some circumstances, drive upon the left-hand side of the street without being guilty of negligence, and whether it is negligence so to do in any particular case must depend upon the facts of such case. It is contended further that, in the present case, the facts show an excuse for the driver's action; it is said that, when the street car did not pass on as he anticipated, but stopped in such a position that he could neither go forward nor turn to the right, he was confronted with an emergency, and whether he acted with due prudence in his effort to escape therefrom was a question of fact for the jury, not one of law for the court.

It is probably the general rule that one confronted with a sudden peril, not arising from any fault of his own, may, to avoid bodily harm to himself, act in the way the emergency seems to require without being guilty of negligence, even though in so acting he injures another who in no way contributed to the condition creating the peril. This seems to be the holding in the case of *Donahue v. Kelly,* 181 Pa. St. 93, 37 Atl. 186, 59 Am. St. 632, and is perhaps the corollary of the rule illustrated by the two shipwrecked mariners on the plank. The act, however, is not one which the law commends, and before it will be given application, it must be clear that an emergency existed, that it was brought about by no negligent act of the person in the perilous situation, and that the resultant injury to the second person could not be prevented after the peril had passed. Here it is clear by the testimony of the driver of the automobile that he does not come within the rule. He had abundant time, according to his own testimony, to have stopped the automobile before he reached the place of peril, had he not been mistaken in assuming the street car was not going

to stop. But this was a usual stopping place for street cars, and it was negligence for him to assume that it was not going to stop in this instance. Again, after he had turned and avoided the peril, he had abundant time, at the speed he was traveling, to have stopped the automobile before striking the respondent, had the brakes on the automobile been in proper condition. One who operates on the streets of a city such a dangerous instrumentality as an automobile is bound to take notice that he may be called upon to make emergency stops, and it is negligence on his part not to keep the automobile in such condition that such stops are possible.

We have then a condition of the record in which the testimony of both the respondent and the appellants show negligence. It was not, therefore, error on the part of the court to assume that there was no conflict in the evidence on the question of negligence and to charge the jury accordingly, even though the court may have been influenced to so act from an inapplicable principle of law.

The case of *Sheffield v. Union Oil Co.*, 82 Wash. 386, 144 Pac. 529, relied upon by the appellants, is not contrary to the principle we here announce. It does not present the question now involved. The question there was one of contributory negligence. The injured party was placed in a position of peril by the negligence of another, and the evidence was conflicting on the question whether he acted negligently or with due prudence in his endeavor to escape from the peril, and hence presented a question for the determination of the jury. The case before us presents a different state of facts, and the evidence is also without conflict. Here the appellant, to avoid injury to himself, ran down and injured another. The cause of his being placed in the perilous situation and his acts in

extricating himself therefrom are disclosed by his own testimony. Since the testimony shows conclusively that he was guilty of negligence, there was no question for the jury.

The claim of error under the second assignment is that the verdict is excessive. The jury allowed a recovery of $1,500, and it is contended that the injuries shown were only nominal, while the verdict is substantial. But to reach this conclusion we must disregard the evidence of the respondent and adopt that of the appellants. This was the province of the jury, not ours.

A final contention is that the plea of contributory negligence in the answer of the appellant Christ Schultz stands undenied and must be taken as true, and so taking it, no recovery can be had as against him. But the answer appearing in the record transmitted to this court was filed subsequent to the trial of the case before the jury, and were the question open to the appellant, it may be doubtful if the record is sufficient to invoke the rule. The case, however, was tried on its merits as if an issue had been formally joined, without contention on the part of either side that any traversable allegation of the pleadings had been admitted. The failure to deny was, therefore, waived by want of timely objection. *Kelly v. Lum,* 75 Wash. 135, 134 Pac. 819, 49 L. R. A. (N. S.) 1151; *Yeisley v. Smith,* 82 Wash. 693, 144 Pac. 918.

The judgment is affirmed.

HOLCOMB, C. J., MOUNT, MITCHELL, PARKER, TOLMAN, MACKINTOSH, and MAIN, JJ., concur.

[No. 15218. Department Two. June 12, 1919.]

ETHEL FOSTER, *Respondent*, v. INDUSTRIAL INSURANCE COMMISSION, *Appellant*.[1]

MASTER AND SERVANT (121-2)—WORKMEN'S COMPENSATION ACT—ADOPTION OF FIXED SCHEDULE—CAPRICIOUSNESS—REVIEW. Under Rem. Code, § 6604-20, allowing an appeal from an award of damages by the industrial insurance commission upon questions of fact, the action of the commission is not capricious or arbitrary in that an award for $150 for the loss of part of a finger was determined by a system of "degree" classifications made by the commission under Laws 1917, p. 81, § 1, subdiv. f., which names fixed sums from $2,000 to $1,800, for the loss of various major parts of a leg or arm, and requires that compensation for other permanent partial disability shall be in the proportion which the extent of the disability shall bear to the disabilities specified in the act most closely approximating such other disability in degree of disability.

SAME (121-2)—AWARD BY SINGLE MEMBER OF COMMISSION. An award of $150 for the loss of part of a finger, according to the schedule fixed, is not capricious or arbitrary in that it was made by only one of the commissioners, where the schedule was adopted by the commission as a whole, by its "degree" classifications under Laws 1917, p. 81, § 1, subdiv. f., which contemplates that individual awards be made in the exact sum provided by a definite and uniform schedule.

Appeal from a judgment of the superior court for King county, Frater, J., entered September 23, 1918, upon findings in favor of the plaintiff, setting aside an award for personal injuries and directing the payment of a greater sum, upon appeal from the ruling of the industrial insurance commission. Reversed.

The Attorney General and *D. E. Twitchell, Assistant*, for appellant.

Walter S. Fulton, for respondent.

HOLCOMB, C. J.—On the 26th day of April, 1918, respondent filed with the industrial insurance com-

[1]Reported in 181 Pac. 912.

mission her claim for compensation, alleging that, on the 22d day of April, 1918, while engaged in an extra hazardous occupation in the city of Seattle, King county, Washington, she sustained an injury which resulted in the amputation of the middle finger of the left hand at the distal joint (that being the joint nearest the finger-nail) and a laceration about an inch long over the dorsal surface of her ring finger of the left hand. Her injury was classified by the commission as a "permanent partial disability" of the affected area, who awarded her the sum of $48.45 for time lost and the further sum of $150 for the permanent partial disability. Dissatisfied with the amount of the award, respondent thereupon appealed from the ruling of the commission to the superior court for King county, her appeal being heard on September 18, 1918. At the close of respondent's testimony, the appellant moved to dismiss the appeal, which motion was denied; and, after hearing respondent's evidence, judgment was entered reversing the action of the commission, setting aside the award of the commission, and remanding the claim to the commission with directions to pay the claimant the sum of $400, together with her costs, and allowing an attorney's fee of $25. From the lower court's action, the commission brings this appeal.

The question of fact as to the injury being undisputed, the cause presents several questions of law for our determination. The theory of the appeal, basically, is that the award of the commission is inadequate as compensation for the injury sustained. We can readily understand and sympathize with the vigorous protest of His Honor, the trial judge, for we also regard the award as pitifully inadequate; but, as we shall see, the correction of such insufficiency is neither

with the courts nor with the commission, but must be remedied by the legislative function of the state alone. The industrial insurance act is not one designed to award full compensation to each individual for all such damages as such individual would be entitled to in his peculiar circumstances, but is only a system of limited insurance whereby all industrial employees within the statute are paid definite but limited amounts for injuries, without regard, as we have said, to the particular individual circumstances or needs of the injured employee. The injury alone is the subject which can be considered by the commission under the statute, and applies to and covers all classes of injuries alike.

To consider, now, the first proposition presented for our determination: Rem. Code, § 6604-20, is very definite as to the matter of appeal from the award of the commission to the superior court.

"Any . . . workman, or person feeling aggrieved at any decision of the department . . . may have the same reviewed by . . . an appeal . . . in so far as such decision rests upon questions of fact . . . *it being the intent that matters resting in the discretion of the department shall not be subject to review* . . . In all court proceedings under or pursuant to this act, the decision of the department shall be *prima facie* correct, and the burden of proof shall be upon the party attacking the same."

To the limitation of appeal made in this statute, this court has suggested the qualification that an award might be reviewed by the courts were the commission charged with "capricious or arbitrary action in fixing the amount of their award." *Sinnes v. Daggett,* 80 Wash. 673, 142 Pac. 5. The respondent, feeling aggrieved at the inadequacy of the award, based her appeal therefrom upon the alleged "capricious and arbitrary action" of the commission, manifested in

two ways; first, in the method it has adopted of scheduling the amount of compensation to be awarded any given injury; and second, upon the fact that, in this particular instance, the award was made by a single member of the commission, instead of by all three members.

Has the superior court authority to declare that the system of awards as practiced by the commission is capricious and arbitrary? For this is practically what the superior court in this case has done by substituting its award for that of the commission.

The question may be answered by a reference to the statute. Subdivision f of § 1, ch. 28, Laws of 1917, p. 81, provides in part:

"For the permanent partial disabilities here specifically described, the injured workman shall receive compensation as follows:

Loss of one leg amputated so near the thigh that an artificial limb cannot be worn	$2,000.00
Loss of one leg at or above the knee so that an artificial limb can be worn	1,900.00
Loss of one leg below the knee	1,300.00
Loss of the major arm at or above the elbow	1,900.00
Loss of the major hand at wrist	1,600.00

. . . . . .

"Compensation for any other permanent partial disability shall be in the proportion which the extent of such other disability shall bear to that permanent partial disability above specified which most closely resembles and approximates in degree of disability such other disability, but not in any case to exceed the sum of two thousand dollars ($2,000.00)."

Under this statute the claimant receives compensation for his injuries irrespective of his earning ability and irrespective of any other thing except the loss which he has sustained. Appellant introduced in evidence a schedule it has adopted by means of which any given loss, for instance, that of the finger, receives

a certain definite award, determined by a system of "degree" classifications; injuries not specified by the statute being therein proportionately related to injuries specified by the statute. The respondent was awarded compensation according to this schedule.

It will be seen from the statute that the commission is limited to merely arranging a schedule within limitations carefully laid down. Not only is a total sum prescribed for a specified loss, but where an injury is not one of those so specified in the statute, the commission is ordered to make an award proportionate to the award specified "which most closely resembles and approximates in degree of disability such other disability" (that is, a specified disability). Of course, under this statute, the courts have authority to determine whether or not a schedule adopted by the commission for unspecified injuries is properly proportionate to the most closely related specified injury. That question is not raised in this action.

Obviously, a superior court cannot say that an award made from a schedule so defined and limited by law as is this and of so universal and uniform application is a capricious and arbitrary one; an inadequate one, as in this instance it is, but inadequacy is not synonymous with capriciousness.

The extent and nature of an injury is a matter, of course, for competent medical knowledge to determine. But, as we have indicated, there is no question as to the injury itself, the physician of respondent does not take issue with the physician of appellant who classified the injury.

The question then remains, Was the fact that the award was made by one commissioner instead of three an irregularity sufficient to justify reversing the award? We, of course, agree with respondent's contention that, respecting plural boards and commissions,

generally speaking, "the law contemplates that all will meet together so that the public will have the benefit of their combined judgment and discussion." (Mechem, Public Officers, § 577). But it is almost to reduce that principle to an absurdity to claim that it applies to ministerial acts merely following an agreed and prescribed course of procedure. The commission by adopting the schedule of awards had, as to an injury determined by competent medical knowledge to be within a given degree of the schedule, precluded any necessity for "the combined judgment and discussion" of the whole commission on each or any individual award. The fixing of the degree fixed the amount of the award. The one member of the commission in this case merely declared the amount of award allowed by the schedule for an injury such as was certified to the commission by the commission's physician, nor could the commission collectively have done more or less.

The respondent says:

"Had the legislature intended that a fixed and arbitrary schedule should be applied in the awarding of compensation, it would have embodied it in the compensation act."

As we read the statute, this is precisely what the legislature did design, namely, to insure that the commission would fix a definite and uniform schedule. We have seen how, under subd. f, § 1, ch. 28, Laws of 1917, p. 81, the more common injuries resulting in permanent partial disabilities are specifically set forth and compensated for in exact sums; and for those not therein set forth a very definite principle of compensation is provided, as we have seen, on the proportionate rating of the unspecified injury to the specified injury which "most closely resembles and approximates it." In view of the myriad possibilities of hu-

man injuries, this is as definite and comprehensive as a statute could well be.

The judgment of the lower court is reversed and the decision of the commission affirmed.

MOUNT and PARKER, JJ., concur.

FULLERTON, J., concurs in the result.

[No. 15345. Department Two. June 12, 1919.]

J. G. RALEY, *Appellant*, v. SCHRAM & WARE, *Respondent*.[1]

GUARANTY (9)—CONSTRUCTION—AGENCY CONTRACT—SCOPE AND EXTENT OF LIABILITY. There was no sale by the agent, within the meaning of an agency contract for the sale of goods whereby the agent guaranteed credits extended, where the agency contract forbade credit exceeding $1,500, and required the agent to recoup the principal for all losses in excess of three-fourths of one per cent, and it appears that, upon the agent's request for authority to make a "close out sale" to a certain customer greatly exceeding the credit limitation, the principal held the matter up pending its own investigation of the credit and finally wired the agent to deliver the goods.

Appeal from a judgment of the superior court for King county, Ronald, J., entered October 26, 1918, upon findings in favor of the defendant, in an action on contract, tried to the court. Affirmed.

Gill, Hoyt & Frye, Walter Schaffner, and *R. L. Blewett*, for appellant.

J. P. Wall, for respondent.

HOLCOMB, C. J.—On December 1, 1909, the Marion Iron and Brass Bed Company, an Indiana corporation, contracted with the Manufacturer's Distributing Com-

[1]Reported in 181 Pac. 867.

pany, a domestic corporation, by which the latter became agents of the former in the distribution of the former's product. The principal agreed to pay its agent fifteen per cent commission on sales. As to the terms at which sales might be made by an agent, the agreement provided that the agent should follow instructions sent it from time to time as to such terms of sale; that no sale should be made below the list price unless expressly authorized; that the basis of credit was to be the ratings contained in the latest published book of the Bradstreet Mercantile Agency; that credit in excess of the sum of $1,500 could not be extended to any one customer; and that the agent would pay to its principal all losses in excess of three-fourths of one per cent sustained by the principal.

In May, 1911, there was an accumulation of about four hundred beds in the warehouse of the agent, these being the property of the principal, awaiting disposal in the course of trade. At that time the Grand Rapids Furniture Agency of Seattle was about to open a retail furniture business in Seattle and was approached by the Manufacturer's Distributing Company with a view to the sale of the four hundred beds then on hand. The result of those negotiations was that, on May 5, 1918, the Distributing Company (as we will call the Manufacturer's Distributing Company) telegraphed the Marion Iron and Brass Bed Company calling attention to the opening of the Grand Rapids Agency's store and asking that a special price be put upon the stock of beds owned by the Marion Iron and Brass Bed Company in the Distributing Company's warehouse so that a "close out" sale of the entire stock to the proposed new concern might be made. To this the Marion Company answered: "Cut ten per cent if absolutely necessary account clearing up stock."

May 18, 1911, the Distributing Company reported by letter as follows:

"We have closed a deal with the Grand Rapids Furniture Agency of this city, a new firm just opening up, on the entire lot of iron beds in Seattle stock. Terms one-third net September, October and November 1st. They hope to open some time next month or probably not until July 1st."

May 29, 1911, the Marion Company replied to this letter:

"Please furnish us all the information you can possibly secure relative to the Grand Rapids Furniture Agency, to whom you have sold the Seattle stock. As this is a new concern we would like to get a line on their credit standing before making delivery of beds to them. We have asked the Dun agency for a special report on them."

May 31; telegram of Distributing Company to Marion Company:

"See our letter of the eighteenth [above]. Have you secured rating to warrant us delivery entire shipment. We believe account OK. Wire at once."

June 1; reply telegram of Marion Company to Distributing Company:

"Have wired for rating dont deliver goods until we instruct."

June 2; telegram from Marion Company to Distributing Company:

"Dun wires no rating assigned you see local representatives of Duns and when satisfactory rating for this amount of credit is assigned deliver stock."

No further communications appear to have been exchanged by these parties until June 9, when the Marion Company wired the Distributing Company: "Deliver stock to Grand Rapids Furniture Agency."

Obeying this instruction, the beds were accordingly delivered to the Grand Rapids Company by the Distributing Company. On June 12, certain of the principal stockholders of the Grand Rapids Furniture Agency entered into a written guarantee of the Grand Rapids account, which guarantee was forwarded by the Distributing Company to the Marion Company.

The question as to whether this was a sale by the principal, the Marion Company, or by the agent, the Distributing Company, to the Grand Rapids Furniture Agency arose by reason of the bankruptcy of the Grand Rapids Furniture Agency while still a debtor of the bed company. In the bankruptcy proceedings, the Marion Company secured a portion of its claim, and thereafter sued the Distributing Company for the balance between the sale price and the sum recovered from the trustee, basing such action upon the clause of the contract of agency stipulating that the agent should recoup the principal for losses in excess of three-fourths of one per cent on the total sales. The Distributing Company denied that this was a sale within the terms of the agency contract, the principal itself having assumed the responsibility of determining the financial status of the prospective purchaser, and denied making the sale or extending any credit to the purchaser, within the meaning of the contract of agency between the parties.

Trial without a jury resulted in judgment for the Distributing Company. The appellant here asks us to reverse the result reached by the trial court and find that such sale was made by the agent as would obligate it to the principal within the loss guarantee clause of its agreement.

This we are unable to do as a conclusion from the facts which we have reviewed above. It is clear to us, as it apparently was to the trial court, that the ex-

change of correspondence preceding the sale to the Grand Rapids Furniture Agency amounted to the extension of credit to that concern by the Marion Iron and Brass Bed Company and not by the Manufacturer's Distributing Company. That this was not a sale, within the terms of the agency agreement, is obvious from the fact that the amount of merchandise sold to the Grand Rapids Furniture Agency was much in excess of the credit limitation of $1,500 in the contract; beyond this sum, as we have noticed, the agreement expressly provided that the agent should have no authority to extend credit. By the principal's action in accepting an account in excess of that sum, knowingly, and after diligent inquiry into the prospective purchaser's financial responsibility, we are impelled to hold that the sale in question was one which, although originally an incident of the parties' relationship, was not within the terms of the agency contract to the extent of obligating the agent for the losses sustained by the principal in the transaction.

The judgment is affirmed.

MOUNT, FULLERTON, and PARKER, JJ., concur.

[No. 15349. Department Two. June 12, 1919.]

HARRY P. ECUYER, *Respondent*, v. NEW YORK LIFE INSURANCE COMPANY, *Appellant*.[1]

APPEAL (473)—REVIEW—LAW OF CASE. The facts on a second trial being the same as on the former trial, the decision on the former appeal becomes the law of the case.

LIBEL AND SLANDER (16, 35)—EXCEEDING PRIVILEGE—EVIDENCE—SUFFICIENCY. Charges by an insurance auditor and cashier that a cash clerk of an insurance company had stolen money, made at an interview with the clerk at which the father was present, are only qualifiedly privileged, and whether the statement was *bona fide* or malicious is a question for the jury, notwithstanding the defendant's officers testified positively that there was no malice and that they spoke and acted in good faith for the welfare of the company, where the charge was not confined to the admitted fact that the clerk was short a small sum in his accounts, it appeared that others in the office might have stolen the money from his cash drawer, a close cross-examination of plaintiff did not detract from his straightforward and convincing evidence, and thereafter other like slanderous statements were made to other parties.

CORPORATIONS (190)—REPRESENTATION BY AGENTS—SLANDER. An insurance corporation is liable for a malicious slander uttered by its auditor and cashier charging a cash clerk with stealing, made upon inspecting and checking up his accounts, the same being within the scope of their employment.

LIBEL AND SLANDER (53)—INSTRUCTIONS. In an action for slander, in which there was evidence that the defendant's officers had exceeded their privilege in charging a cash clerk with stealing, no just complaint can be made of submitting the question of exceeding the privilege, requiring the plaintiff to show malice, and if the privilege was exceeded and malice shown, authorizing the jury to fix the damages, but allowing no special damages for loss of employment in the absence of any evidence thereof.

SAME (36)—DAMAGES—MEASURE. In an action for slander, in charges by a life insurance company that its cash clerk had stolen money, made to his father, in excess of privilege and repeated to others, the repetition and republication may be considered as to the question of malice and in aggravation of compensatory damages.

SAME (37)—DAMAGES—MENTAL SUFFERING. In an action for slander, in charges by a life insurance company that its cash clerk

[1]Reported in 181 Pac. 871; 186 Pac. 327.

had stolen money, the words being actionable *per se* without reference to plaintiff's business or professional character, he is entitled to recover for mental suffering.

SAME (38)—DAMAGES—AMOUNT. A verdict for $6,000 reduced by the trial court to $3,000 for slander by an insurance company in charging its cash clerk with stealing, is not excessive.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered November 21, 1918, upon the verdict of a jury rendered in favor of the plaintiff, in an action for slander. Affirmed.

H. T. Granger (*Jas. H. McIntosh,* of counsel), for appellant, contended, among other things, that the corporation was not liable because the officers were not acting within the scope of their employment. *Southern Express Co. v. Fitzner,* 59 Miss. 581, 42 Am. Rep. 379; *Aetna Life Ins. Co. v. Paul,* 37 Ill. App. 439; *Behre v. National Cash Register Co.,* 100 Ga. 213, 27 S. E. 986, 62 Am. St. 320; *Kane v. Boston Mutual Life Ins. Co.,* 200 Mass. 265, 86 N. E. 302; *Stewart Dry Goods Co. v. Heuchtker,* 148 Ky. 228, 146 S. W. 423; *National Packing Co. v. Boullion,* 105 Ark. 326, 151 S. W. 244; *Singer Mfg. Co. v. Taylor,* 150 Ala. 574, 43 South. 210, 9 L. R. A. (N. S.) 929; *Sawyer v. Norfolk & S. R.,* 142 N. C. 1, 54 S. E. 793, 115 Am. St. 716; *Childs v. Bank of Missouri,* 17 Mo. 213; *Eichner v. Bowery Bank of New York,* 48 N. Y. Supp. 978; *Waters-Pierce Oil Co. v. Bridwell,* 103 Ark. 345, 147 S. W. 64, Ann. Cas. 1914B 837; *Lindsey v. St. Louis, I. M. & S. R. Co.,* 95 Ark. 534, 129 S. W. 807.

The statements were qualifiedly privileged. *Ecuyer v. New York Life Ins. Co.,* 101 Wash. 247, 172 Pac. 359, L. R. A. 1918E 536; *Fahey v. Shafer,* 98 Wash. 517, 167 Pac. 1118.

The privilege shifted the burden of proof and made it necessary for plaintiff to show actual or express malice. *Holmes v. Royal Fraternal Union,* 222 Mo.

556, 121 S. W. 100, 26 L. R. A. (N. S.) 1080; *Laughlin v. Schnitzer,* 106 S. W. (Tex. Civ. App.) 908; *Ashcroft v. Hammond,* 197 N. Y. 488, 90 N. E. 1117; *Hayden v. Hasbrouck,* 34 R. I. 556, 84 Atl. 1087, 42 L. R. A. (N. S.) 1109; *Houston Chronicle Publishing Co. v. McDavid,* 157 S. W. (Tex. Civ. App.) 224; *Hansen v. Hansen,* 126 Minn. 426, 148 N. W. 457, L. R. A. 1915A 104.

In an action for libel or slander damages cannot be assessed for physical sickness alleged to have been caused by the libel or slander. *Butler v. Hoboken Printing & Publishing Co.,* 73 N. J. L. 45, 62 Atl. 272; *Cyrowski v. Polish-American Pub. Co.,* 196 Mich. 648, 163 N. W. 58; *Houston Chronicle Pub. Co. v. McDavid, supra.*

James R. Chambers, for respondent, contended that a corporation is liable for its slanders or libels when perpetrated by an agent when acting within the scope of his authority. *Gallagher v. Singer Co.,* 177 Ill. App. 198; *Pennsylvania Iron Works Co. v. Voght Mach. Co.,* 129 Ky. Law 861, 96 S. W. 551; *Fogg v. Boston & L. R. Corp.,* 148 Mass. 513, 20 N. E. 109, 12 Am. St. 583.

The old rule that a corporation could not be liable for slander or libel has been done away with. 25 Cyc. 428; 1 Clark & Marshall, Private Corporations, pp. 627-629; Newell, Slander and Libel (3d ed.), pp. 436-439; *Grand Union Tea Co. v. Lord,* 231 Fed. 390, Ann. Cas. 1918C 1118; *Empire Cream Separator Co. v. De Laval Dairy Supply Co.,* 75 N. J. L. 207, 67 Atl. 711; *Rivers v. Yazoo & M. R. Co.,* 90 Miss. 196, 43 South. 471, 9 L. R. A. (N. S.) 931; *Williams v. Planters Ins. Co.,* 58 Miss. 759, 34 Am. Rep. 494; *International & G. N. R. Co. v. Edmundson,* 185 S. W. (Tex. Civ. App.) 402; *Howe Machine Co v. Souder,* 58 Ga. 64; *Pfister v. Milwaukee Free Press Co.,* 139 Wis. 627, 121 N. W. 938; *Hardoncourt v. North Penn. R. Co.,* 225 Pa. 379,

74 Atl. 243; *Peterson v. Western Union,* 65 Minn. 18, 67 N. W. 646, 33 L. R. A. 302; *Dobbin v. Chicago, R. I. & P. R. Co.,* 157 Mo. App. 689, 138 S. W. 682; *Alabama & V. R. Co. v. Brooks,* 69 Miss. 168, 13 South. 847, 30 Am. St. 528; *Richberger v. American Express Co.,* 73 Miss. 161, 18 South. 922, 55 Am. St. 522, 31 L. R. A. 390; *Sawyer v. Norfolk & S. R.,* 142 N. C. 1, 54 S. E. 793; *Hussey v. Norfolk & S. R. Co.,* 98 N. C. 34, 3 S. E. 923, 2 Am. St. 312; *International Text-Book Co. v. Heartt,* 136 Fed. 129; *Palmeri v. Manhattan R. Co.,* 133 N. Y. 261, 30 N. E. 1001, 16 L. R. A. 136; *Dick v. Northern Pac. R. Co.,* 86 Wash. 211, 150 Pac. 8, Ann. Cas. 1917A 638; *Cyclohomo Amusement Co. v. Hayward-Larkin Co.,* 93 Wash. 367, 160 Pac. 1051.

The question of excess of privilege depending upon the *bona fides,* is one of fact for the jury. *Bacon v. Michigan Cent. R. Co.,* 66 Mich. 166, 33 N. W. 181; *Ecuyer v. New York Life Ins. Co.,* 101 Wash. 247, 172 Pac. 359, L. R. A. 1918E 536.

The damages were not excessive and it was unnecessary to show pecuniary loss. 25 Cyc. 531; *Rose v. Imperial Engine Co.,* 110 App. Div. 437, 96 N. Y. Supp. 808; *Woodhouse v. Powles,* 43 Wash. 617, 86 Pac. 1063, 117 Am. St. 1079, 8 L. R. A. (N. S.) 783; *Viss v. Calligan,* 91 Wash. 673, 158 Pac. 1012, Ann. Cas. 1918A 819; *Davis v. Tacoma R. & Power Co.,* 35 Wash. 203, 77 Pac. 209, 66 L. R. A. 802; *Cyclohomo Amusement Co. v. Hayward-Larkin Co., supra; Coffman v. Spokane Chronicle Pub. Co.,* 65 Wash. 1, 117 Pac. 596, Ann. Cas. 1913B 636; *Warren v. Kearney,* 63 Wash. 369, 115 Pac. 739; *Boyd v. Boyd,* 116 Va. 326, 82 S. E. 110; *Blakeman v. Blakeman,* 31 Minn. 396, 18 N. W. 103; *Bloomfield v. Pinn,* 84 Neb. 472, 121 N. W. 716; *Williamson v. Eckhoff,* 185 Mo. App. 234, 170 S. W. 322; *Wolkowsky v. Garfunkel,* 65 Fla. 10, 160 South.

791, 44 L. R. A. (N. S.) 351; *Hulbert v. Arnold,* 83 N. J. L. 114, 83 Atl. 497; *Brown v. Publishers: George Knapp & Co.,* 213 Mo. 655, 112 S. W. 474; *De Severinus v. Press Pub. Co.,* 147 App. Div. 161, 132 N. Y. Supp. 80; *Bresslin v. Star Co.,* 85 Misc. Rep. 609, 148 N. Y. Supp. 295; *Adams v. Cameron,* 27 Cal. App. 625, 150 Pac. 1005; *Estelle v. Daily News Pub. Co.,* 101 Neb. 610, 164 N. W. 558; *Minter v. Bradstreet Co.,* 174 Mo. 444, 73 S. W. 668; *Ogden v. Gibbons,* 5 N. J. L. 518; *Payne v. Rouss,* 46 App. Div. 315, 61 N. Y. Supp. 705; *Press Pub. Co. v. Gillette,* 229 Fed. 108; *Bishop v. Journal Newspaper Co.,* 168 Mass. 327, 47 N. E. 119; *Scott v. Sun Printing & Pub. Ass'n,* 26 N. Y. Supp. 690; *Palmer v. New York News Pub. Co.,* 31 App. Div. 210, 52 N. Y. Supp. 539; *Schoepflin v. Coffey,* 25 App. Div. 438, 49 N. Y. Supp. 627; *Houston Chronicle Pub. Co. v. Quinn,* 184 S. W. (Tex. Civ. App.) 669.

HOLCOMB, C. J.—In *Ecuyer v. New York Life Ins. Co.,* 101 Wash. 247, 172 Pac. 359, L. R. A. 1918E 536, we reversed a judgment of nonsuit, dismissing an action for slander tried to the court and a jury, and remanded the case for retrial. Upon retrial in the court below, respondent recovered judgment against appellant in the sum of $6,000, whereupon appellant unsuccessfully moved for judgment notwithstanding the verdict and moved for a new trial, which was denied upon condition that respondent remit the sum of $3,000 from the verdict in his favor, which thereafter respondent, under protest, did, and judgment was entered in the court below in the sum of $3,000 and costs against appellant, from which it has appealed.

Appellant also moved, at the close of respondent's evidence, that the court direct a verdict for appellant upon the ground that the evidence was insufficient to

authorize a verdict for respondent, which motion was also denied.

Sixteen errors are alleged by appellant; four of them being based upon the court's refusal to direct a verdict for appellant; denying the motion for a new trial; denying the motion for judgment notwithstanding the verdict and entering judgment for respondent for $3,000 and costs; and that the verdict is excessive, alleging that it was rendered under the influence of prejudice and passion; the remaining assignments of error being based upon instructions given by the court to the jury and excepted to by the appellant.

The issues and the facts pleaded and proven are substantially the same as at the former trial, and reference is made to the former opinion, *supra,* for an understanding thereof. In addition to the evidence at the former trial, appellant introduced the testimony of witnesses Norton, the cashier, and Buxton, traveling auditor, of appellant, whose testimony was to the effect that neither of them accused respondent of wilfully taking the money of appellant, or of having any malice or intent to injure respondent, or of having any authority on the part of appellant to make such charges.

The law of the case was generally settled by the former decision. In brief, we there decided that:

"Words falsely spoken of a person which impute to him some criminal offense involving moral turpitude for which he, if the charge were true, might be indicted and punished, and defamatory words falsely spoken of a person which in themselves prejudice him in his profession, trade or vocation, are slanderous and actionable *per se.* . . . It is obvious, therefore, that all four of the utterances here charged as slanders were slanderous *per se,* unless they were either true or privileged. Appellant contends that neither of them was either true or privileged. Respondent insists that all were true, and all were privileged whether true or not."

It will be observed that the appellant there is the respondent here, and that respondent there is the appellant on this appeal. We also there said:

"The truth of the communication is a complete defense to the civil action for libel or slander. But defamatory words are presumed to be false until proven to be true. The onus of such proof lies on the defendant. . . . The words charged as slanderous in the first communication were proven to have been published by utterance to and in the presence of appellant's father. They were direct, unequivocal and repeated charges that appellant had stolen the money then missing and other unnamed sums. So far as the evidence shows, the whole truth was that the receipts showed that appellant had collected the money and his cash book showed that he had not accounted for it. Had the offending communication been confined to a statement of those facts, the evidence, which conclusively established their truth, would have made a complete defense. But it was not so confined. He was charged with stealing the money. That charge was not established by such a degree of proof that any court would be justified in saying that the minds of reasonable men might not differ as to its truth. The question was one for the jury. Appellant denied that he took the money, the key was in the lock of the cash drawer, the room was the common office room of many employees, any one of whom might have taken the money and the corresponding memorandum slips. The evidence was conclusive of appellant's carelessness but not of his dishonesty."

Upon the trial now before us for review, the situation was the same as presented in the previous trial regarding the words spoken of and concerning the respondent in this appeal; and the respondent was subjected to a close and critical cross-examination which did not in the slightest detract from his straightforward and convincing evidence.

On the former appeal we held that, if the occasion of the use of the words was privileged at all, it needs neither argument nor citation of authority to show that the privilege was not absolute but qualified, holding the rule of qualification to be:

"Where the communication is prompted by a duty to the public or to a third person, or is made touching a matter in which the party making it has an interest to another having a corresponding interest, it is privileged if made in good faith and without malice. . . . Though malice is the gist of the criminal charge of libel . . . it is not ordinarily an essential element in the civil action for slander or libel . . . But this is not true in cases involving the qualified privilege. In such cases, actual malice must be proved, and the onus of proof is upon the plaintiff . . . Where it is not disputed that the words were uttered, the question whether the occasion was privileged is one for the court; whether *bona fides* existed in the statement made or whether it was malicious is usually a question of fact for the jury. . . . This the jury must determine from the language itself and the surrounding circumstances."

It is now contended by appellant on this appeal that there is no evidence of malice on the part of the officers of appellant company, and that, on the other hand, they positively testified that they had no malice, but were only looking to the welfare of the company and acted and spoke as they did in good faith. The jury, however, was competent to judge of their credibility, and, as we said on the former appeal, the jury had to determine from the language itself and all the surrounding circumstances whether the statements were made in good faith or were malicious. Having held before that the occasion was one of qualified privilege, the question of whether the privilege was exceeded is to be determined from the character of the charges made and of the circumstances surrounding them; and

we must now hold, upon the record before us, that this question was foreclosed by the verdict of the jury.

Appellant contends, however, that Norton and Buxton had no authority to make slanderous statements whereby the company would be bound. We are of the opinion that this question is also foreclosed by our decision on the former appeal; but whether so or not, it was alleged and shown that appellant is a corporation organized under the laws of the state of New York, doing business in this state and conducting a branch office in Seattle; that, at all the times mentioned in the complaint, Norton was the cashier of the Seattle office and in charge of all the moneyed operations of that office; and that Buxton was a branch office examiner of appellant whose duty it was to examine the accounts and financial operations of appellant's branch offices in the city of Seattle and also in the state of Washington, and also all branch houses throughout the United States and the Dominion of Canada; that on the day, April 11, 1916, when the defamatory statements were made, Buxton and Norton, acting within their duties and the scope of their authority, were duly examining the finances of the Seattle office, including the moneyed operations and accounts handled by the respondent as assistant cashier to Norton, and that appellant, through its authorized agents Norton and Buxton, both together and separately, made the slanderous statements charged by respondent. It is further alleged that thereafter other like statements were made to other people specifically named, and that thereafter, on April 15, 1916, other like slanderous statements were made to one H. H. Ward, and thereafter, on April 22, 1916, other like slanderous statements were made to other parties. In its amended answer, appellant admits that it is a corporation engaged in the business of life insurance; admits that respond-

ent was in its employ at the Seattle office as bonded clerk; admits that Buxton, acting within the duties of his employment by appellant, examined the finances of appellant's Seattle office, and that, as a result of such examination, appellant claimed that respondent was short in his account. Appellant further admits that Norton, named in the complaint, was an employee of the appellant in its Seattle office, and was known as the cashier thereof and was charged with the same duties as respondent, but was superior in authority to respondent. Appellant also admits that Buxton, named in the complaint, was in the employ of appellant and was engaged in auditing and checking up from time to time the accounts and records of the respondent and other employees of the Seattle office, and that Buxton demanded of the respondent that he turn over to the appellant the two sums of money of which his accounts were alleged to be short, as it was his duty then and there to do.

In *Grand Union Tea Co. v. Lord,* 231 Fed. 390, Ann. Cas. 1918 C 1118, the court, in speaking of the authority of the traveling auditor to bind the company for slander, says:

"It is argued, in the first place, that defendant, a corporation, is not liable for the alleged slander because the statement concerning Lord was not made by Van Allen in the scope of his employment or in the performance of his duties, and particularly because it was not authorized by the corporation. We deem it unnecessary to review the numerous cases involving the liability of a corporation for the tortious acts of its agent, because the law is well settled that a corporation is liable for the slanderous words of the agent if the agent at the time is transacting the business of the corporation, and the slanderous words are spoken in the course of such business and in connection therewith."

See, also, *Gallagher v. Singer Sewing Machine Co.*, 177 Ill. App. 198; *Pennsylvania Iron Works Co. v. Voght Machine Co.*, 29 Ky. Law 861, 96 S. W. 551; *Fogg v. Boston & L. R. Co.*, 148 Mass. 513, 20 N. E. 109, 12 Am. St. 583.

In view, therefore, of the admissions and allegations of the pleadings, including those of appellant, we cannot sustain this contention of appellant. Corporations are liable for libel and slander uttered by their officers and agents in the scope of their employment, the same as for other torts.

We have carefully examined the instructions given by the court to the jury in full, and while many objections are made to them or to portions of them, without setting them out at length, which would make this opinion much too long, we are of the opinion that they carefully follow the law of the case as laid down in the decision upon the former appeal of this case, and, in fact, in some respects were somewhat favorable to appellant. The jury was carefully instructed that the occasion was privileged and that respondent could not recover damages unless the privilege was exceeded and abused, thereby requiring respondent to show malice, and the jury was to consider all of the language spoken and the time, place and circumstances thereof and all of the evidence before it, and determine therefrom whether or not the defamatory statements made by appellant's agents were made in good faith or with malice. In view of this evidence, as we have said before, there is no doubt that the jury was justified in finding that the privilege was exceeded and that there was malice.

The instructions further charged the jury that, if it found that the privilege was exceeded and malice was shown and that the words were slanderous *per se*, in such case, respondent was entitled to recover and

the jury were to fix his damages within the amount demanded in the complaint, but that it could not allow any special damages or damages for loss of employment or failure to secure employment, as there was no evidence thereof. This, briefly, was the manner of the submission of the case to the jury under the instructions, and we think there is no just complaint to be made of them.

Last, that the verdict is excessive, and that the judgment as rendered by the court, after reducing the verdict, is excessive. This is largely based upon the assertion that the defamatory statements were only made to respondent's father, were made without malice, and that there is no proof of any humiliation, mental suffering and general damage. The evidence is, however, that respondent is an adult, twenty-five years of age, that the statements were made to the father of respondent, and were also repeated to other persons; and such repetition is a matter to be considered in fixing damages, for it is the rule that, although only general or compensatory damages, without any special damages arising from and upon injuries flowing from the slander, may be recovered, repetition and republication of the slander by the defendant may be considered by the jury as to the question of malice and in aggravation of damages: 25 Cyc. 535; *Stowell v. Beagle,* 79 Ill. 525; *Fowler v. Gilbert,* 38 Mich. 292; *Kean v. McLaughlin,* 2 Serg. & R. (Pa.) 469. It has also been held that, because a libel or slander involves an injury to a plaintiff's feelings, as well as to his reputation, his injury may be greater if the defamatory words are uttered with express malice than if there is only the malice which the law implies from intentionally doing, without justification, that which in its natural tendency is injurious. 25 Cyc. 534. In this

case, the words being actionable *per se,* without reference to the business or professional character of respondent, he was entitled to recover for the mental suffering occasioned by the publication of the defamation. Respondent testified as to his mental suffering and humiliation and was corroborated by members of his father's family, and the lower court exercised its discretion and reduced the damages allowed by the jury to a moderate sum. We are not now disposed to interfere with that award.

We find no error justifying reversal, and the judgment is affirmed.

PARKER and FULLERTON, JJ., concur.

ON REHEARING.

[*En Banc.* December 22, 1919.]

PER CURIAM.—Upon a rehearing *En Banc,* a majority of the court adhere to the view expressed in the opinion heretofore filed, to the effect that there is no prejudicial error in the case and that the judgment should be affirmed.

[No. 15358. Department One. June 18, 1919.]

In the Matter of the Estate of DANIEL C. CORBIN. THE STATE OF WASHINGTON, *Appellant*, v. AUSTIN CORBIN *et al., Executors etc., Respondents.*[1]

TAXATION (225-229)—INHERITANCE TAXES — COMPUTATION — STATUTES. The inheritance tax law, Rem. Code, § 9182, and § 9183, as amended by Laws 1917, p. 196, making classifications which require the relationship of each legatee to be considered in order to determine the rate, was intended to tax the right to receive by inheritance as distinguished from a tax upon the property or the right to transmit it; hence each legacy must be considered as a separate entity and taxed as such at the statutory rate.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered April 7, 1919, in favor of the executors of an estate, in an action to determine the method of computing an inheritance tax, after a trial to the court upon an agreed statement of facts. Affirmed.

C. R. Jackson, State Tax Commissioner, and *Geo. G. Hannan, Assistant,* for appellant. The exemption is taken from that portion of the estate going to a class of heirs or legatees collectively and not from each specific legacy, and accordingly the tax should be computed upon the whole estate. *In re McKennan's Estate,* 27 S. D. 136, 130 N. W. 33, Ann. Cas. 1913D 745, 33 L. R. A. (N. S.) 620; *In re Macky's Estate,* 46 Colo. 79, 102 Pac. 1075, 23 L. R. A. (N. S.) 1207; *Magoun v. Illinois Trust & Savings Bank,* 170 U. S. 282; *In re Timkin's Estate,* 158 Cal. 51, 109 Pac. 608, 26 L. R. A. (N. S.) 242; *McGannon v. State ex rel. Trapp,* 33 Okl. 145, 124 Pac. 1063, Ann. Cas. 1914B 620; *Matter of Sherman's Estate,* 179 App. Div. 497, 166 N. Y. Supp. 19; *Id.,* 222 N. Y. 540, 118 N. E. 1078; *In re Mc-*

[1]Reported in 181 Pac. 910.

Ghee's Estate, 105 Iowa 9, 74 N. W. 695; *In re Howell's Estate,* 147 Pa. St. 164, 23 Atl. 403; *Dixon v. Ricketts,* 26 Utah 215, 72 Pac. 947; *In re Hone's Estate,* 50 Utah 92, 166 Pac. 990; *Posey v. Commonwealth,* 96 S. E. (Va.) 771; *State ex rel. Gilmore v. District Court of Custer County,* 45 Mont. 335, 122 Pac. 922, Ann. Cas. 1914A 469.

Allen, Winston & Allen, for respondents.

TOLMAN, J.—Daniel C. Corbin, a resident of Spokane county, there died on June 29, 1918, leaving an estate which, after deducting debts and expenses properly allowable under the inheritance tax law, amounted in value to $743,425.52. Deceased by his will devised this estate to his widow, a son, and a daughter, in unequal proportions. The executors and the tax commissioner were unable to agree upon the method of computing the inheritance tax and applying the graduated rates provided by Rem. Code, § 9183, as amended by the Laws of 1917, ch. 43, p. 196. The tax commissioner contended that all of the legatees and devisees were within the first class, as defined by the statute, and that, after deducting the exemption, the graduated rates should be applied to the estate passing to them as a whole; while the executors contended that the graduated rates should be applied to each bequest or legacy as a separate entity. By the first mentioned method of computation, the inheritance tax would, by reason of the graduated rates, amount to considerably more than by the second. The matter was submitted to the trial court upon an agreed statement of facts, and that court adopted the method of computing the tax contended for by the executors, and entered judgment accordingly, from which judgment the state has appealed.

The act which we are called upon to consider is entitled, "An act relating to the taxation of inheritances and providing for the disposition of the same." In the first section (Rem. Code, § 9182), it is provided that,

"All property within the jurisdiction of this state, and any interest therein, . . . which shall pass by will or by the statutes of inheritance . . . to any person in trust or otherwise, shall, for the use of the state, be subject to a tax as provided for in section 9183, . . . and all administrators, executors and trustees, and any such grantee under a conveyance, and any such donee under a gift, . . . shall be respectively liable for all such taxes to be paid by them . . . The inheritance tax shall be and remain a lien on such estate from the death of the decedent until paid."

In the second section as now amended, ch. 43, Laws of 1917, p. 196, it is provided:

"The inheritance tax shall be imposed on all estates subject to the operation of this act at the following rate:

"If passing to or for the use of a father, mother, husband, wife, lineal descendant, adopted child or lineal descendant of an adopted child, the tax shall be one per centum of any value not exceeding fifty thousand dollars; two per centum of any value in excess of fifty thousand dollars and not exceeding one hundred thousand dollars; three per centum of any value in excess of one hundred thousand dollars and not exceeding two hundred fifty thousand dollars; five per centum of any value in excess of two hundred fifty thousand dollars: . . ."

Following are other classifications based upon relationship or want of it, each taking a different rate.

Bearing upon the question to be here determined, we must inquire whether this act imposes a tax upon the right to receive property by inheritance as distinguished from a tax upon the property itself thus passing, or a tax upon the right to transmit property

by will or under statutes of succession. A reading of the statute at once suggests that, in assessing the tax, the relationship or classification of each legatee or devisee must be considered in order to determine the rate of taxation; and the language of the act and its title, fairly construed, seem to point toward the conclusion that the legislative intent was to impose a tax upon the right to receive, rather than a tax upon the property itself or upon the right to transmit it. This court has been called upon in a number of cases to consider this legislation, though in none of them was the question now in issue raised; yet some light may be shed upon the present subject by a study of what has been heretofore said.

In *State v. Clark*, 30 Wash. 439, 71 Pac. 20, the constitutionality of the law was attacked, and the opinion deals mainly with constitutional questions. Among other expressions which might be quoted, it is there said:

"The rule of equality in taxation is invoked against this exemption. It may be observed that the rule invoked does not forbid a liberal classification for purposes of taxation. The classification made here is manifestly reasonable. There is no inequality among the members of the same class. This objection is discussed in many of the authorities heretofore cited. It is so completely met and disposed of in the case of *Magoun v. Illinois Trust & Savings Bank, supra* [170 U. S. 283] that it must be convincing here."

The writer of that opinion quoted from and repeatedly referred to the case of *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, and so clearly followed and adopted its reasoning as to make it binding upon us practically to the same extent as though it were a decision by this court. It is said in the *Magoun* case, at page 300:

"The tax is not on money; it is on the right to inherit; and hence a condition of inheritance, and it may be graded according to the value of that inheritance."

This court again considered the act in the case of *In re Clark's Estate,* 37 Wash. 671, 80 Pac. 267. It was there said:

"We do not think that the claim of the state treasurer can be upheld. The inheritance tax is payable out of the legacies, and is chargeable to the individual legatees. The court cannot compel one legatee to pay the inheritance tax due from another, and yet such is the effect of the order appealed from."

In *In re White's Estate,* 42 Wash. 360, 84 Pac. 831, there was involved the question of whether the title of the act was sufficiently broad to cover a tax on the right of succession by will as well as by operation of law, and it was there held that the act imposes a tax on the right of succession, whether the property passed by will, by operation of law, or by grant or gift, to take effect upon the death of the grantor or donor.

In *In re Stixrud's Estate,* 58 Wash. 339, 109 Pac. 343, Ann. Cas. 1912A 850, 33 L. R. A. (N. S.) 632, it was squarely held that this act imposes a tax, not upon property, but upon the right or privilege of receiving it.

In *In re Lotzgesell's Estate,* 62 Wash. 352, 113 Pac. 1105, it was held that the inheritance tax was not a debt of the testator, but was properly chargeable to the legatees.

If, then, as we have already held, the tax is one upon the right to receive, to be paid, in the last analysis, by the legatee, and if one legatee cannot be held to pay the tax of another, does it not likewise follow that the amount of the tax to be paid by any one legatee must be determined from the amount of the legacy received by him, and not, either in whole or in

part from the amount which may be received by others? We are convinced that a fair reading of the statute itself leads to that conclusion; and every expression of this court during the eighteen years that it has been the law lends support to that position. Not only so, but the reasoning of other courts in construing similar laws, while not wholly harmonious, abundantly supports our conclusions. *Knowlton v. Moore,* 178 U. S. 41; *In re Macky's Estate,* 46 Colo. 79, 102 Pac. 1075, 23 L. R. A. (N. S.) 1207; *In re McKennan's Estate,* 25 S. D. 369, 126 N. W. 611, 33 L. R. A. (N. S.) 606; *Id.,* 27 S. D. 136, 130 N. W. 33, Ann. Cas. 1913D 745, 33 L. R. A. (N. S.) 620; *In re Fox's Estate,* 154 Mich. 5, 117 N. W. 558; *McGannon v. State ex rel. Trapp,* 33 Okl. 145, 124 Pac. 1063, Ann. Cas. 1914B 620.

We conclude, therefore, that the legislative intent was that each legacy should be considered as a separate entity and taxed as such at the statutory rate, and therefore the judgment appealed from was right and is affirmed.

HOLCOMB, C. J., MITCHELL, MAIN, and MACKINTOSH, JJ., concur.

[No. 15290. Department One. June 24, 1919.]

IRVING GREENE, *Appellant*, v. JOHN GARRISON *et al.*, *Respondents*.[1]

LANDLORD AND TENANT (128, 137)—UNLAWFUL DETAINER—TIME TO SUE. A tenant's action of unlawful detainer against a sublessee is not prematurely commenced, at the end of the term because of plaintiff's agreement for an extension of the sublease, in case his own lease was extended pursuant to an oral agreement, where it appears that he was unable to secure an extension of his lease and so promptly notified the sublessee.

Appeal from a judgment of the superior court for King county, Allen, J., entered December 21, 1918, upon granting a nonsuit, dismissing an action of unlawful detainer. Reversed.

Elias A. Wright and *Sam A. Wright*, for appellant.
Van C. Griffin, for respondents.

MITCHELL, J.—By a written lease, plaintiff became a tenant of a storeroom in the Liberty building, in Seattle, for a term commencing March 10, 1917, and ending August 31, 1918. On August 18, 1917, by an agreement in writing, he sublet a portion of the premises from that date to August 15, 1918, to persons who transferred their rights and possession to defendants, with the consent of plaintiff. Upon refusal of defendants to vacate the premises on August 15, 1918, plaintiff instituted this action in unlawful detainer on August 17, 1918, wherein, by a writ of restitution executed by the sheriff, the premises occupied by defendants were restored to plaintiff on August 22, 1918. In the agreement by which defendants held the premises, plaintiff represented he had the privilege, in a certain manner, of a renewal of the lease under which he held, and

[1]Reported in 181 Pac. 858.

agreed that, in the event he succeeded in getting a renewal of his lease, the privilege of an extension would be given the sublessees.

At the trial, on November 15, 1918, the evidence showed that plaintiff had relied upon an oral promise of his lessor for the extension of his lease referred to, but that, prior to August 15, 1918, he was notified by his lessor an extension of his tenancy could not, and would not, be given; and plaintiff in turn so notified defendants sometime prior to the expiration of their subtenancy. Plaintiff surrendered possession to his lessor on August 31, 1918, as provided by the terms of the lease. At the conclusion of plaintiff's proof, the trial court granted a nonsuit against plaintiff, holding that whatever rights he had from his lessor would pass to defendants as to that portion of the property sublet to them, thus entitling defendants to the right of possession until August 31, 1918, and entered judgment accordingly. Plaintiff has appealed.

The agreement by which respondents held the property specifically provided for a tenancy ending August 15, 1918. True, the sublease provided:

"And it is agreed that in the event the lessor, or his assignee succeeds in renewing his original lease, that the lessees herein named shall likewise have the privilege of renewing this lease . . ."

But, as already noticed, appellant was unable to get an extension, and seasonably notified respondents to that effect.

The action was not prematurely brought, and the judgment is reversed.

HOLCOMB, C. J., MAIN, and MACKINTOSH, JJ., concur.

[No. 15334. Department Two. June 24, 1919.]

B. T. WOODS, *as Receiver of Mountain Mill Company, Appellant*, v. YOUNG LUMBER COMPANY, *Respondent*.[1]

CHATTEL MORTGAGES (16, 18)—AFFIDAVIT—NOTARIAL CERTIFICATE—SUFFICIENCY. A chattel mortgage will not be held void as to creditors by reason of failure of the notary taking the acknowledgment and affidavit of good faith to impress his notarial seal upon the certificate to the affidavit of good faith, where such seal was duly affixed to his certificate to the acknowledgment, made by the same person who swore to the affidavit which immediately followed the acknowledgment, all constituting one instrument executed in all its parts at the same time.

Appeal from a judgment of the superior court for Pierce county, Fletcher, J., entered April 7, 1919, upon sustaining a demurrer to the complaint, dismissing an action by a receiver to avoid an alleged preference obtained by a creditor of an insolvent corporation. Affirmed.

Leopold M. Stern, for appellant.
Davis & Neal, for respondent.

PARKER, J.—The plaintiff Woods, as receiver of the Mountain Mill Company, seeks recovery of a money judgment against the defendant, Young Lumber Company, upon the ground that it has received a preference payment as a creditor of the Mountain Mill Company, after the company became insolvent. The lumber company demurred to the receiver's complaint upon the ground that it did not state a cause of action, which demurrer was sustained by the superior court; and the receiver electing to stand upon his complaint and not plead further, judgment of dismissal was rendered against him, from which he has appealed to this court.

[1]Reported in 181 Pac. 865.

The only question necessary for us to notice is as to whether or not the chattel mortgage executed by the mill company, under which a sale of certain of its property was had in satisfaction of the lumber company's claim after the mill company's insolvency, was void for want of the attaching of the notary's official seal to his jurat certifying to the subscribing and swearing to the affidavit of good faith made by the president of the mill company, the mortgagor. The acknowledgment and the affidavit of good faith were both made by the president of the mill company in its behalf before the same notary. The notary's certificate of acknowledgment and his jurat certifying to the subscribing and swearing to the affidavit of good faith by the president were separate certificates, each being separately signed by the notary. Near to his signature upon the certificate of acknowledgment he placed in the usual position an impression of his official seal. There was no other impression of his official seal elsewhere upon the instrument. The affidavit of good faith immediately followed the certificate of acknowledgment, and the notary's jurat certifying to the subscribing and swearing to the affidavit followed the president's signature thereto. The mortgage, certificate of acknowledgment, affidavit of good faith, and certificate of the notary of the making of the latter, manifestly constitute one instrument, executed in all its parts at the same time.

Counsel for appellant invokes the general rule that the absence of an impression of a notary's official seal from the certificate of his performance of an official act, except in cases wherein the statute expressly dispenses with the necessity of a seal, renders the certificate of no effect, as held in *Gates v. Brown,* 1 Wash. 470, 25 Pac. 914, and *Stetson & Post Mill Co. v. McDonald,* 5 Wash. 496, 32 Pac. 108. The real con-

troversy here is whether or not there is such an absence of an impression of the notary's official seal from his jurat certifying to the subscribing and swearing to the affidavit of good faith as to render that certificate of no effect. In other words, can it be held that the one impression of the notary's official seal near his signature to the certificate of acknowledgment is sufficient in law to render both certificates effective under the facts in this case. It is plain that this mortgage was made with a view not only of its becoming a good mortgage, as between the mortgagor and mortgagee, but with a view of its becoming a good mortgage as against all persons who might, after its execution, become interested in the mortgaged property. This was manifestly the intent and purpose at the time of its execution; and, as we have noticed, all acts of the parties, including those of the notary, having to do with its execution were concurrent as to time and constitute in effect one transaction. This, we think, is plainly evidenced upon the face of the instrument as a whole. In Rem. Code, § 3660, relating to the manner of executing chattel mortgages, we read:

"A mortgage of personal property is void . . . unless it is accompanied by the affidavit of the mortgagor that it is made in good faith, and without any design to hinder, delay, or defraud creditors, and unless it is acknowledged . . ."

It is plain that both the acknowledgment and the affidavit of good faith are necessary to a complete execution of the mortgage, except as between the mortgagor and mortgagee. These two acts are so intimately related to each other in their purpose that the evidencing thereof by the notary might well be done by the notary in one certificate, especially when the instrument is acknowledged and the affidavit made by the same person. Plainly there is nothing in the stat-

ute requiring him to evidence the two acts by two separate certificates. We are of the opinion that, in view of the concurrence of all the acts on the part of the mortgagor, mortgagee and the notary, the acknowledgment and affidavit of good faith being made by the same person in behalf of the lumber company, the two certificates of the notary may be considered as one act; and the attaching of the seal to the certificate of acknowledgment be also deemed an attaching of it to the jurat certifying to the president's subscribing and swearing to the affidavit in good faith.

We have not had brought to our attention any authorities that we regard as exactly in point. It seems, however, that the reasoning of the decision of the New York Court of Appeals in *Olcott v. Tioga R. Co.*, 27 N. Y. 546, 84 Am. Dec. 298, supports the conclusion we here reach. In that case there was involved a notary's certificate of protest, and another separate certificate by him upon the same paper of the mailing of notices of the protest on the same day, the notary's seal being attached in the usual position near his signature to one certificate, but not elsewhere upon the paper. In holding that the one seal was sufficient to satisfy the law as to both certificates, and that it might be regarded as attached to both, Judge Selden, speaking for the court, all the other judges concurring, said:

"The statute contemplates but a single certificate as evidence of the presentment of a note or bill for payment, its protest, and the giving of notice of its dishonor. The language of the statute is this: 'The certificate of a notary, under his hand and seal of office, of the presentment by him of any promissory note or bill of exchange for acceptance or payment, and of any protest of such bill or note for non-acceptance or non-payment, and of the service of notice thereof on any or all of the parties,' etc., 'shall be pre-

sumptive evidence of the facts contained in such certificate.' (3 R. S., 5th ed., 474.) The notary may undoubtedly certify to each of the acts separately, but he may also, by one certificate, verify them all. If the certificate be 'under his hand and seal of office,' it is sufficient, and it cannot be of any importance where the seal is affixed. It may be at the beginning, at the end, or anywhere upon the margin, or might be appended by a ribbon, after the manner of the sealing of ancient charters. The officer is not required to certify to the sealing, but it is sufficient if the seal be, in fact, affixed, and the name signed. Unquestionably, therefore, if the seal had been placed where it is, and the signature only at the bottom of the last part of the certificate, the whole would have been sufficiently verified. I do not think it is any the less so by reason of the words, '*In testimonium veritatis,*' with the signature opposite the seal, between the two parts of the certificate. The whole may, with propriety, be regarded as one certificate, once sealed and twice signed. *I adopt this conclusion the more readily, because the objection is merely formal, the certificate, in its present form, furnishing all the security against error, and imposing upon the notary all the responsibility which it could do if another seal were added.*"

We have italicized the portion of the language used by the learned judge which we think furnishes the key to the solution of our problem. The only difference, we think, between the situation there involved and that here involved, is that there the statute seems to have contemplated evidencing the facts by a single certificate of the notary, while here our statute is silent upon the question of whether the notary shall evidence the taking of the acknowledgment and the subscribing and swearing to the affidavit of good faith by one or two certificates. We are quite convinced, however, that, under our statute, there is nothing preventing the notary evidencing the two acts by one certificate, and that, under the circumstances here shown, he may be

considered as having done so, in so far as the attaching of his official seal is concerned. The only decision coming to our notice which we regard as being authority to the contrary is that of *DeGraw v. King,* 28 Minn. 118, 9 N. W. 636.

The judgment is affirmed.

HOLCOMB, C. J., MOUNT, and FULLERTON, JJ., concur.

[No. 15201. Department One. June 25, 1919.]

THE STATE OF WASHINGTON, *Appellant,* v. H. O. SHUEY, *Respondent.*[1]

INDICTMENT AND INFORMATION (45) — INTENT — "WILLFULLY" — NECESSITY. Under Rem. Code, § 3601-27, making it a misdemeanor for any officer or agent of a savings and loan association to "willfully" violate or fail to comply with the provisions of the act, an information is insufficient to sustain a conviction unless it charges that the act complained of was "willfully" done; since the elements of *scienter* and bad purpose are involved and constitute the gravamen of the offense.

Appeal from a judgment of the superior court for King county, French, J., entered May 10, 1918, arresting a judgment of conviction and vacating the verdict, in a prosecution for a misdemeanor. Affirmed.

Alfred H. Lundin and *Frank P. Helsell,* for appellant.

Clise & Poe, for respondent.

MITCHELL, J.—The information in this case charged defendant with a misdemeanor. After alleging place and time, and that he was one of the directors of a building and loan association, it is then charged:

"and while acting as such director of said association, did then and there authorize, direct, vote for,

[1]Reported in 181 Pac. 890.

and cause the said Equitable Building-Loan & Investment Association to declare and pay a semi-annual dividend of three per cent (3%), upon all of the stock of said association then issued and outstanding, for the semi-annual period between January 1, 1916, and July 1, 1916, when, in truth and in fact, said association, during said period, had not acquired any net earnings whatsoever."

Upon return of a verdict of guilty, judgment was arrested on the motion of defendant, on the ground that the facts stated in the information do not constitute a crime. The state has appealed.

The statutes of this state relating to the organization, management, regulation and control of building and loan, and savings and loan, associations and societies are comprehensive, commanding or prohibiting the doing of many things mentioned in detail. The last section pertaining to the subject, Rem. Code, § 3601-27, provides:

"Every officer, director, agent or other employee of any savings and loan association, who shall willfully violate or fail to comply with any of the provisions of this act, shall be guilty of a misdemeanor."

It is contended by the state that respondent is accused by the information, to the extent of criminal liability, with having violated that portion of Rem. Code, § 3601-7, which provides that: "Dividends shall be taken from the net earnings of the association . . ." by having authorized and voted for, and caused the association to declare and pay, a dividend for a specified period during which it had not acquired any net earnings. The offenses provided for by these statutes are statutory, and, while we have generally held it is sufficient to lay such charges in the language of the statute, it will not do to employ less than the statutory language or its equivalent. A criminal statute can

reach no further than the limitations prescribed by the words of the statute. The information charges respondent with doing certain things, as a director of the association, which the statute says he shall not do. But the penal section of the act does not declare the doing of these things to be a misdemeanor. On the contrary, that one's conduct may constitute a crime, it exacts not simply that he violate, but that he willfully violate the provisions of the act; and in the process of construing the information nothwithstanding the rule of liberality, it will not do to eliminate the word "willfully" from the statute, for manifestly it is the quality of the act which constitutes the gist of the offense. The distinction between doing an act and willfully doing it rests upon reason and is recognized by the authorities. The elements of *scienter* and bad purpose are involved and constitute the gravamen of the offense.

Appellant cites the case of *Commonwealth v. Bradford,* 50 Mass. (9 Metc.) 268. That was a case in which one was indicted for willfully giving in a vote at an election, knowing himself not to be a qualified voter. The defendant admitted he gave in his vote, and one of the questions was the correctness of the decision of the trial court that the admission was sufficient to support the averment that he voted willfully, concerning which the court said:

"Considering the manner in which the word 'wilfully' is used in the statute, the court are of opinion that this was right. It may sometimes mean corruptly or unlawfully; but in this section, where the gist of the offense consists in the other clause, 'knowing himself not to be a legal voter,' the term 'wilfully' means designedly, purposely, with an intent to claim and exercise the right of suffrage, on that occasion, in common with the legal voters of the city."

But that case is not in point here, because there the statute required, and the indictment charged, a willful voting. The point decided was a matter of proof.

Viewed from another angle, appellant cites the case of *State v. Smith,* 31 Wash. 245, 71 Pac. 767. It was a case of grand larceny, wherein the question presented was that the information did not state a crime because the word "feloniously" was not used in the information. After setting out the information and quoting the statutes defining grand larceny and petit larceny, this court said:

"It will be noticed that the only difference between the crime of grand larceny and that of petit larceny, as defined by these statutes, is in the value of the property taken. The words 'feloniously steal' appear in each."

And then, answering the question presented, the court said:

"Under these statutes it is not necessary that the word 'feloniously' should be used to define the crime of grand larceny, if other words conveying the same meaning are used instead. The word 'feloniously' means 'with intent to commit a crime.' (Webster.) The word 'steal' means 'to take and carry away feloniously—without right or leave.' (Webster.) It implies a felonious taking. As the words are used in this statute the word 'feloniously' refers to the intention with which the stealing is done. When it is alleged that the defendant *unlawfully stole* $785, *with intent to defraud the owner thereof,* the felony defined was sufficiently alleged to sustain a judgment after verdict."

That case is not in point, for, as already seen, the information in the present case contains no word or words equivalent to the word "willfully," used in the statute. We do not find occasion to review all the authorities furnished by appellant. The rule applicable here is found in the case of *Spurr v. United States,*

174 U. S. 728, quoted from *Potter v. United States,* 155 U. S. 438, 445, viz.:

"The charge is of a wilful violation. That is the language of the statute. Section 5208 of the Revised Statutes makes it unlawful for any officer of a national bank to certify a cheque unless the drawer has on deposit at the time an equal amount of money. But this section carries with it no penalty against the wrongdoing officer. Section 13 of the act of 1882 imposes the penalty, and imposes it upon one 'who shall wilfully violate,' etc., as well as upon one 'who shall resort to any device,' etc., 'to evade the provisions of the act;' 'or who shall certify cheques before the amount thereof shall have been regularly entered to the credit of the dealer upon the books of the banking association.' The word 'wilful' is omitted from the description of offences in the latter part of this section. Its presence in the first cannot be regarded as mere surplusage; it means something. It implies on the part of the officer knowledge and a purpose to do wrong. Something more is required than an act of certification made in excess of the actual deposit, but in ignorance of that fact or without any purpose to evade or disobey the mandates of the law. The significance of the word 'wilful' in criminal statutes has been considered by this court. In *Felton v. United States,* 96 U. S. 699, 702, it was said: 'Doing or omitting to do a thing knowingly and wilfully, implies not only a knowledge of the thing, but a determination with a bad intent to do it or omit doing it. The word 'wilfully,' says Chief Justice Shaw, 'in the ordinary sense in which it is used in statutes, means not merely 'voluntarily,' but with a bad purpose.' 20 Pick. (Mass.) 220."

See, also, *United States v. Edwards,* 43 Fed. 67; *State v. Preston,* 34 Wis. 675; *Williams v. People,* 26 Colo. 272, 57 Pac. 701; 14 R. C. L. 177.

The order granting the motion in arrest of judgment and vacating the verdict was proper, and is affirmed.

MAIN and TOLMAN, JJ., concur.

[No. 15189. Department Two. June 30, 1919.]

F. A. BEELER *et al.*, *Respondents*, v. STANDARD INVESTMENT COMPANY *et al.*, *Appellants*.[1]

CORPORATIONS (218) — RECEIVERS — GROUNDS — EVIDENCE — SUFFICIENCY. A receiver for a corporation operating a large dairy farm should not be appointed upon the ground of the incompetence and mismanagement of the manager and failure to keep proper accounts and make monthly statements, where it appeared conclusively that, although a young man, he was thoroughly qualified, had conducted it in a businesslike manner, making profits of $9,000 more than in any previous year, and all necessary accounts were properly kept, the books were open to inspection, and a system of monthly statements would entail much labor.

SAME (218)—RECEIVERS (3)—GROUNDS—DISCRETION. While Rem. Code, § 741, gives wide discretion to the superior court to appoint receivers, it was not intended to authorize a receiver for a solvent corporation merely because the minority were dissatisfied with the majority, conducting the corporation in good faith.

Appeal from a judgment of the superior court for King county, Smith, J., entered September 14, 1918, in favor of the plaintiffs, in an action for equitable relief, tried to the court. Reversed.

W. H. Beatty and *James B. Murphy*, for appellants.

Geo. B. Cole and *John Wesley Dolby*, for respondents.

MOUNT, J.—This action was brought by a minority of the stockholders of the Standard Investment Company, a corporation, for the appointment of a receiver, for an accounting by the trustees, and to wind up the affairs of the corporation and distribute the property among the stockholders.

Generally and briefly stated, the complaint charged that the board of trustees was dominated by James Campbell, the president of the corporation; that Lee

[1]Reported in 181 Pac. 896.

Oien, the manager of the business of the corporation, was inefficient, extravagant and incompetent; that the property was not properly managed and was permitted to deteriorate; that the manager had not accounted for all the proceeds of sales, had made unreasonably poor sales of property and had refused to give the minority stockholders a statement of the affairs of the corporation; and alleged that, unless a receiver was appointed, the property would be wasted and irreparable injury done to the plaintiffs. The answer denied generally all the allegations of the complaint. The case was tried to the court without a jury, and resulted in a judgment appointing a receiver to take charge of the property of the corporation and to sell the same and divide the proceeds among the stockholders according to their respective interests. The defendants have appealed from that judgment.

The appellants make three contentions in this court:

First, that the court erred in appointing a receiver, because all the stockholders were not made parties to the action; second, that the court arbitrarily refused to receive certain evidence offered by the appellants; and third, that there was no cause for the appointment of a receiver.

There is merit in all three of these contentions, but, in view of our conclusion that there was no real cause for the appointment of a receiver, the first two points will not be considered.

It appears that, several years prior to the time of the institution of this suit, the Standard Investment Company was organized as a corporation, with a capital stock of $10,000, divided into 1,000 shares of $10 each. The principal property owned by the corporation is a dairy farm located near Thomas, in King county. This farm consists of about 500 acres of land. It is stocked with a herd of dairy cattle and

other farm stock, tools and equipment. At the time of the trial, the farm was worth more than $200,000. It was subject to a mortgage indebtedness of $50,000 and some other minor indebtedness. At the trial of the case, the principal points contended for by the respondents to show that a receiver should be appointed were that Lee Oien, the business manager of the corporation, in charge of the dairy farm, was incompetent; that he had failed to keep a proper system of accounts, sold property of the farm without accounting therefor, mismanaged the farm by letting it grow to weeds, and neglected to keep up the fences and make proper drainage; that the trustees had refused to furnish a monthly statement to each of the stockholders; had refused to discharge the manager when requested to do so; and that, by reason of extravagant management, the trustees had declared no dividends.

At the conclusion of the trial, the court made no findings of fact, but filed a written opinion, in which he found that the manager in charge of the farm, on account of his youth, was not qualified to manage the farm and that he had not kept proper accounts; that the minority stockholders had not been treated fairly, and that a division of the farm and the property belonging thereto was necessary to secure ample justice to all the parties; and, apparently for that reason, appointed a receiver. The evidence is very voluminous. The abstract of the record alone comprises more than four hundred pages. The writer of this opinion has carefully examined the abstract of the evidence and the court is satisfied therefrom that whatever evidence the respondents offered in support of their general allegations was entirely overcome by the testimony on behalf of the appellants. The manager of the farm selected by the majority stockholders

was a young man, twenty years of age. That fact seemed to control the lower court. The evidence shows conclusively that, while Mr. Lee Oien, the manager, was a young man, he had lived on this particular farm from his early life, when his father was manager thereof, and that he was thoroughly qualified to take care of the farm and had conducted it in a business-like manner. The evidence is conclusive that, under his management, the profits of the farm for the year prior to the trial amounted to $19,000, or $9,000 more than for any previous year. The evidence also conclusively shows that his system of accounts was amply sufficient; that the farm was kept up on an average as good as or better than the majority of the farms in that neighborhood. The effort to show that he had not been honest in his accounts was entirely overcome. There was an endeavor on the part of the respondents to show that the milk and the cows were kept in a filthy condition, but that evidence was entirely overcome by the evidence on the part of the defense. We find no justification in the record for any finding that the management of the farm by Lee Oien was detrimental to any of the stockholders. It is true, upon several occasions he had furnished milk and some vegetables of no special importance to one or two of the stockholders. One of these stockholders was the secretary and treasurer of the corporation, who had served for years without pay; and when he had driven from Seattle down to the farm, he had, upon several occasions, obtained some of the produce of the farm which was not accounted for. But this clearly could not be regarded as mismanagement or incompetency on the part of the manager. It was contended by the respondents that the trustees were dominated by the president of the corporation. If this is so, there was no evidence of a wrongful domination. He and the

other trustees were elected by a vote of a majority of the stock and were thereby authorized to control the affairs of the corporation according to their best judgment; and when they do this they do their full duty, notwithstanding the fact that the minority stockholders do not agree to their policy. There was no evidence of fraud or unfair treatment of the minority stockholders.

Much evidence was introduced upon the trial to the effect that the fences were not properly kept up and that a drainage system should be installed; but we think, when the appellants' testimony was considered, it is plain that no criticism should be made against the trustees or the manager on account of the fences. It was shown that a drainage system upon this farm would be expensive. Some of the witnesses testified that it would cost about $30 per acre, and the evidence on the part of the appellants shows that an effort had been made to establish a drainage district in that section of the country so as to include other farms beside this; and this being so, it was a question of policy with the trustees whether they should put in an independent expensive drainage system or not. The evidence shows that it was the desire of the governing trustees, who were all stockholders, that the debt should be paid, rather than that dividends be declared or extensive improvements made upon the farm. This was a question of policy which was within the discretion of the governing trustees, and we are satisfied no serious criticism could be offered because an expensive drainage system was not installed. There was some evidence on the part of the respondents to the effect that the ditches and drains on the place were allowed to become stopped up and clogged. The evidence on the part of the appellants shows that these ditches and drains were cared for each year properly, and we are

satisfied that no criticism should be made by the minority stockholders upon this account.

The respondents argue that, under Rem. Code, § 741, relating to the appointment of receivers, the court is authorized to appoint a receiver, "when, in the discretion of the court, it may be necessary to secure ample justice to the parties: . . ." This section gives to the court wide discretion in matters of that kind, but it was clearly never intended that, where a corporation is a solvent, going concern, a minority of the stockholders may have the corporation dissolved and its affairs wound up simply because they are not satisfied with the way the majority is conducting the corporation, especially when the majority is acting in good faith and exercising their best judgment. No contention is made in this case that the corporation is insolvent. It is plain from the evidence that, when the corporation was formed, the value of the property was $10,000, the par value of the stock. It is now worth at least, according to the testimony, $200,000, encumbered by a mortgage of $50,000. So it is apparent that the stock, which a few years ago was worth but $10 a share, is now—if the figures given upon the trial are correct—worth $100 or $150 a share. The net profits of the corporation for the last year were more than $19,000; so there can be no reasonable claim that the corporation is insolvent or liable to become so. We said, in *Secord v. Wheeler Gold Min. Co.*, 53 Wash. 620, 102 Pac. 654, at page 625:

"The policy of the corporation, if honestly conducted, must be controlled by the majority of the stockholders. Mistakes, inadvertence, or bad policy, if honestly pursued, will not warrant the appointment of a receiver."

That must rule this case. The respondents rely upon the case of *Boothe v. Summit Coal Min. Co.*, 55

Wash. 167, 104 Pac. 207. That was a case where the stock in a corporation was held equally by two persons who could neither agree nor elect officers. One set of officers, by reason of a failure of election, claimed to hold over. These officers were not honestly conducting the corporation, because of extravagant management and increased salaries paid to one of the stockholders. In that case, we said, at page 177: "After a most diligent research we have been unable to find any case similar to this. It is *sui generis.*" Upon the facts in that case, we concluded that it was within the discretion of the court whether a receiver should be appointed, and that a receiver was necessary to secure ample justice to the parties; but that case is far different from this. In this case, two-thirds of the stockholders are satisfied with the management of the farm. So far as the record shows, they are conducting the farm at a profit. They are exercising their honest judgment in the management of the affairs of the corporation; and it is apparent, therefore, that no receiver should be appointed. The respondents insisted in the trial below that a monthly statement should be furnished to each of the stockholders and that this had been refused by the trustees. It was shown that this monthly statement would entail upon the manager of the farm and upon the secretary of the corporation much labor; that the secretary of the corporation was acting, as were the other trustees except the manager, without salary, and that they had devoted their time to the affairs of the company without remuneration. The evidence on the part of the appellants showed, also, that the books of the corporation were open at all times to the minority stockholders; that they were at liberty, not only to inquire of the secretary and treasurer what the books showed, but they were at liberty to inquire of the manager at

any time the condition of the accounts or the business of the farm; that, for the year prior to the trial, the manager of the farm had kept a diary of everything upon the farm; that the pay rolls and everything of that nature were open to inspection of the minority stockholders.

From every angle of the case, we are satisfied that the trial court was not authorized under the facts to appoint a receiver or to wind up the affairs of this solvent, going company.

The judgment appealed from is therefore reversed and the cause ordered dismissed.

HOLCOMB, C. J., FULLERTON, and PARKER, JJ., concur.

[No. 15214. Department Two. June 30, 1919.]

THOMAS S. HOPGOOD, *Respondent*, v. J. C. MILLER, *Appellant*.[1]

USURY (13) — RECOVERY OF USURY PAID — EFFECT OF PAYMENT. A mortgagor who deeds the mortgaged property in satisfaction of a usurious mortgage note is not estopped, by making such payment, from maintaining an action to recover the usurious interest exacted.

SAME (14, 17)—VALUE OF PROPERTY TAKEN—PLEADING AND PROOF. In an action to recover usurious interest exacted, after plaintiff deeded property to the defendant in satisfaction of the amount demanded, $5,211.60, an answer denying that the property was worth any sum in excess of $5,000, admits it was of that value; and it having been taken in satisfaction of the demand for $5,211.60, such sum must be assumed to be the value of the property at that time.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered July 2, 1918, upon findings in favor of the plaintiff, in an action to recover usurious interest paid, tried to the court. Affirmed.

[1]Reported in 181 Pac. 919.

Hayden, Langhorne & Metzger, for appellant.

A. A. Hull and *A. R. Rutherford,* for respondent.

MOUNT, J. — This action was brought to recover usurious payments made upon a promissory note. Upon issues joined, the case was tried to the court without a jury, and resulted in a judgment in favor of the plaintiff for $1,000. The defendant has appealed from that judgment.

The facts are not disputed and may be briefly stated as follows: On February 19, 1914, the appellant loaned to the respondent $3,200. At that time the respondent delivered to the appellant a promissory note for $4,284, $1,084 of this amount being represented by a commission charged by the appellant for loaning the money. The note for $4,284 bore interest at the rate of eight per cent per annum until maturity, and after maturity, at the rate of twelve per cent per annum. Thereafter, on August 26, 1914, the respondent paid $85.78 as interest on the note. At the time the note was made, the respondent, to secure its payment, executed and delivered to the appellant a mortgage upon certain real estate in Lewis county. When the note became due, the respondent was unable to pay and was threatened with foreclosure of the mortgage. The respondent thereupon conveyed the mortgaged lands to the appellant on December 18, 1916, and received back from the appellant an option to repurchase the lands at any time before August 1, 1917, for the amount of $5,211.60, together with interest after December 18, 1916, at the rate of eight per cent per annum, together with costs and expenses which appellant might in the meantime have been put to in preserving the property clear of liens. The sum of $5,211.60 represented, on December 18, 1916, the sum of $4,284, named as the principal in the original note,

together with interest thereon from December 18, 1916, at the rate of eight per cent per annum, after allowing credit for the payment of interest made by the respondent. Thereafter the respondent, being unable to raise sufficient money on or before August 1, 1917, with which to repurchase the property under his option, lost his right to repurchase. The trial court found that the appellant charged a bonus of $1,084 knowingly, with the intent thereby of obtaining a greater profit on his loan of $3,200 than twelve per cent per annum; and that the appellant received the conveyance of the property in satisfaction of the note, with the intention thereby of securing a greater profit on his loan of $3,200 than twelve per cent per annum; and that he accepted that conveyance in payment and satisfaction of his note for $4,284, together with principal and interest.

Upon these facts, the trial court concluded that the $1,084 was usurious under the statute, and gave judgment in favor of the respondent for $1,000.

The appellant makes two contentions upon this appeal.

It is first argued that the respondent, if he had a claim against appellant on account of usury, waived his right when he deeded the mortgaged premises in satisfaction of the debt; and it is argued that the respondent is estopped to now recover back the property or the usurious interest paid upon the note. A number of cases are cited to that effect. There can be no doubt that there is much conflict in the authorities upon the question here presented. Some states hold that, where a usurious debt is paid, the debtor waives the right to claim a recovery back for usurious interest. Other states hold to the contrary. These authorities are collected and reviewed in the note to *Zeigler v. Scott,* reported in 54 Am. Dec., pages 395

to 402, inclusive; and also in an exhaustive note to *Lee v. Hillman,* from this court, reported in L. R. A. 1918B, pages 581 to 595, inclusive. Many of the authorities cited in the appellant's brief are noticed in the notes above referred to. Whatever may be the rule in other states, it is settled, so far as this state is concerned, in *Lee v. Hillman,* 74 Wash. 408, 133 Pac. 583, Ann. Cas. 1915A 759, L. R. A. 1918B 581. That was a case where the plaintiff sought a recovery of the value of certain property which he claimed to have surrendered in payment of usurious interest upon loans made to him; and we held that a complaint seeking the recovery of the value of the property surrendered in payment of usurious interest stated a cause of action. In that case, discussing this question, after many authorities had been cited and reviewed, we said:

"We think, however, that it does not follow that the debtor who has been thus unlawfully deprived of money or property may not recover such money or property by a common law *remedy,* and that, of course, under our system means by the ordinary civil action which we have substituted for the common law remedy. While the *right* here involved rests primarily upon our usury statute and would not exist in the absence of such statute, we think an ordinary civil action, that being our substitute for the common law remedy, furnishes a remedy available to the debtor to recover the money or property unlawfully taken from him in payment of usurious interest. . . .

"We are of the opinion that, at least in so far as money or property is exacted in payment of interest above the highest rate permitted by our usury statute, the same may be recovered by the payer thereof in a civil action prosecuted by him as plaintiff."

It follows, therefore, that the respondent has a right in this state, under the rule there announced, to recover back the usurious interest or payments exacted from him upon a usurious transaction. This is upon

the theory that the transaction is unlawful, and that the money or property is exacted in violation of law and can, therefore, be recovered back. Counsel for appellant endeavors to distinguish this case from *Lee v. Hillman* by saying that there this court was not dealing with a case where the party claiming the contract to be usurious had voluntarily settled and discharged the principal obligation; but a reading of the case itself discloses that it was a case where the party claiming the contract to be usurious had voluntarily settled and discharged the principal obligation by paying or delivering property in payment of the obligation, practically the same as in the case now before us.

Appellant makes another point, to the effect that there is no finding of the court to the effect that the market value of the property, at the time of the conveyance, exceeded the principal sum loaned, namely, $3,200, with lawful interest and taxes paid. The complaint alleged that the property delivered to the appellant by the respondent was of the value of $75,000. In answer to this allegation of the complaint, the appellant denied "that the lands and premises described in said deed were of the reasonable value of $75,000, or of any sum in excess of $5,000, . . ." This, of course, was an admission that the real estate, at the time, was of the value of $5,000. Furthermore, the appellant took the property in payment of the $3,200 and the $1,084 bonus and other expenses, aggregating the total amount of $5,211.60, and in the absence of any showing to the contrary, this amount must be assumed to be the value of the property at that time.

We are satisfied, therefore, that the appellant has no complaint to make upon a judgment for $1,000.

The judgment appealed from is therefore affirmed.

HOLCOMB, C. J., PARKER, and FULLERTON, JJ., concur.

[No. 15350. Department Two. June 30, 1919.]

M. BURKE, *Respondent*, v. E. H. WILSON *et al.*, *Appellants*.[1]

ASSIGNMENTS (6, 29)—"CHOSE IN ACTION"—RIGHT OF ASSIGNEE TO SUE. An assignment of any right of action growing out of a conversion of personal property which the assignor had held as security for a debt, is the assignment of "a chose in action for the payment of money," within Rem. Code, § 191, authorizing an assignee for the purposes of suit to maintain an action thereon in his own name; and authorizes an action for the recovery of the property or in the alternative for its value.

CHATTEL MORTGAGES (46, 51) — POSSESSION OF MORTGAGEE — RECOVERY. The rule that a chattel mortgagee has no right to recover possession of the mortgaged property has no application to a mortgage which contemplates the actual transfer of possession; and after such transfer of possession to the mortgagee has actually been made, the mortgagee may maintain replevin when the property is wrongfully taken and withheld.

APPEAL (284, 398)—PRESUMPTIONS—JUDGMENTS IN ABSENCE OF STATEMENT. In the absence of a bill of exceptions or statement of facts, it will be presumed, in aid of a judgment of replevin, that precedent demand was made or that the defense interposed made demand unnecessary.

Appeal from a judgment of the superior court for King county, Ronald, J., entered January 27, 1919, upon findings in favor of the plaintiff, in an action of replevin, tried to the court. Affirmed.

Frank E. Hammond, for appellants.

Philip Tworoger, for respondent.

PARKER, J. — The plaintiff, Burke, as assignee of William Bojezk, commenced this action in the superior court for King county, seeking recovery of possession of a team of horses, a spring wagon, and a set of double harness, which he claims to be entitled to the possession of as against the defendants, the Wilsons

[1]Reported in 181 Pac. 904.

and Chopek, who he claims wrongfully acquired possession thereof from Bojezk and which possession is wrongfully withheld by them; also seeking in the alternative a money judgment against the defendants for the value of the property. Trial upon the merits in the superior court, sitting without a jury, resulted in findings and judgment in favor of the plaintiff and against the defendants, from which they have appealed to this court.

There is no statement of facts or bill of exceptions in the record before us. The facts may be summarized from the trial court's findings as follows: On and prior to July 11, 1918, Bojezk and Chopek were partners in business, and as such were the owners of the property in question. On that day they mutually dissolved their partnership, and, in the settlement of their partnership affairs, made an agreement touching the disposition of this property, as evidenced by two written instruments then executed and to which both were parties. One of the instruments was a plain bill of sale executed by Chopek, purporting upon its face to be an absolute conveyance of this property to Bojezk. The other instrument, executed at the same time and as a part of the same transaction, in so far as we need notice its terms, reads as follows:

"This Agreement made this 11th day of July, 1918, by and between William Bojezk and William Chopek; Witnesseth; Said William Chopek has this day executed and delivered to said William Bojezk a bill of sale on the following described property, to-wit: (description) It is hereby agreed by and between the parties hereto that the said William Bojezk will at his convenience, sell the property and out of the proceeds of the said sale of property, after deducting the sum of $273 and any charges or expenses that he may be put to by reason of said sale, pay to William Chopek any sum that he may realize over the sum of $273 and

such additional charges and expenses that he may be put to by reason of having custody of the said property."

Immediately after the execution of these instruments, they went to the stable where the property was being kept, when it was there delivered into the possession of Bojezk, who then paid the charges existing against it for feed and care. On the following day, July 12, 1918, Chopek, without the knowledge or consent of Bojezk, removed the property from where it had been kept and was left by Bojezk, taking it to, and placing it in, a stable kept by Wilson. Soon thereafter Bojezk, through his attorney, made a demand upon Wilson for the possession of the property, which demand Wilson refused to comply with. At that time the property "was in the actual possession of the said Wilson, and in the constructive possession of the said Chopek." Thereafter, on July 16, 1918, Bojezk executed and delivered to Burke an instrument in writing as follows:

"In consideration of one dollar and other valuable considerations, I hereby assign to M. Burke, all my right, title and interest, in and to right of action I have against E. H. Wilson and Jane Doe Wilson, his wife, and Wm. Chopek, growing out of their conversion of certain personal property belonging to me, to-wit: (description) And I hereby authorize the said M. Burke to bring action to recover either the said property, or the value thereof."

This assignment was executed merely for the purpose of permitting Burke to bring this action, Bojezk retaining title to the rights assigned, as between him and Burke. The court found the value of the property to be $350. No demand was ever made in behalf of Bojezk or Burke upon either Wilson or Chopek for possession of the property, other than the demand

made by Bojezk upon Wilson above noticed. The property remained in the possession of Wilson and Chopek, Burke not having sought to acquire possession thereof by writ of replevin pending the action. The judgment is in favor of Burke for the possession of the property, or upon failure of the Wilsons and Chopek to deliver the same to Burke, for a money judgment against them in favor of Burke for the sum of $273, that being, as the trial court found, the value of Burke's interest in the property, as assignee of Bojezk.

The principal contention here made in behalf of appellants, the Wilsons and Chopek, seems to be that an action of this nature, that is, an action to recover the property, or in the alternative, its value, cannot be maintained by Burke upon this assignment, since it was made solely for the purpose of enabling Burke to maintain the action, and not, as between Bojezk and Burke, to divest Bojezk of his interest in the property and the proceeds of its sale when made in pursuance of his contract with Chopek. Counsel invokes § 179, Rem. Code, providing that:

"Every action shall be prosecuted in the name of the real party in interest, except as is otherwise provided by law."

And argue that § 191, Rem. Code, does not provide otherwise with reference to an action of this nature by an assignee who has become such for the sole purpose of suing upon the chose in action assigned. That section, so far as we need here notice its terms, reads as follows:

"Any assignee or assignees of any judgment, bond, specialty, book account, or other chose in action, for the payment of money, by assignment in writing, signed by the person authorized to make the same, may, by virtue of such assignment, sue and maintain

an action or actions in his or her name, against the obligor or obligors, debtor or debtors, therein named, notwithstanding the assignor may have an interest in the thing assigned: . . ."

The trial court concluded and proceeded upon the theory that the bill of sale and agreement, made at the same time and as a part of the same transaction on July 11, 1918, to which Bojezk and Chopek were parties, became in effect a chattel mortgage, with the right of possession of the property in Bojezk to secure to him the payment of the $273 agreed by the parties as due him upon the settlement of their partnership affairs. Counsel upon both sides of this case proceed upon the same theory, as we understand them, and we may, therefore, safely do likewise, so far as our present inquiry is concerned. It seems to us that what was assigned by Bojezk to Burke was primarily the right of action which Bojezk possessd as against the Wilsons and Chopek for the recovery of the $273, to secure which the property was mortgaged to him, accompanied by his actual possession thereof at the time it was taken from him, and retained by Wilson and Chopek. This was a "chose in action for the payment of money." That Burke could, under § 191, above quoted, maintain an action to recover this sum from Wilson and Chopek, by virtue of the assignment from Bojezk, seems to be conceded; but it is argued that Burke could not maintain, under the assignment, a recovery of the property, because a right thereto such as is here involved is not a chose in action for the recovery of money. We may concede, for argument's sake, that this contention would have some reasonable basis to rest upon if Burke, as Bojezk's assignee, were seeking recovery of the property under a claim of absolute ownership instead of as security for the payment of the $273 for which the mortgage

and possession of the property was given as security. But it has become well settled law that, "In the absence of any provision to the contrary, the unqualified assignment of a chose in action vests in the assignee an equitable title to all such securities and rights as are incidental to the subject-matter of the assignment." 2 R. C. L., p. 633; *National Bank of Commerce v. Lock,* 17 Wash. 528, 50 Pac. 478, 61 Am. St. 923; *Munson v. Exchange National Bank,* 19 Wash. 125, 52 Pac. 1011; *Lewis v. Third Street & Suburban R. Co.,* 26 Wash. 28, 66 Pac. 150. We think it follows that Burke can maintain an action for the recovery of the property from Wilson and Chopek, seeking an alternative money judgment in the same action, notwithstanding the assignment was made for the sole purpose of enabling Burke to enforce by appropriate action the rights possessed and assigned by Bojezk. Our recent decisions in *Olsen v. Hagan,* 102 Wash. 321, 172 Pac. 1173, and *Dyer v. Title Guaranty & Surety Co.,* 106 Wash. 186, 179 Pac. 834, are in harmony with this conclusion.

Contention is made that Burke's only remedy is by an action for damages against Wilson and Chopek, or by an action seeking the foreclosure of the mortgage, and that only by the latter can Wilson and Chopek be deprived of the possession of the property. Counsel for appellants invoke the general rule as announced in *Silsby v. Aldridge,* 1 Wash. 117, 23 Pac. 836, and *Kerron v. North Pacific Lumber & Mfg. Co.,* 1 Wash. 241, 24 Pac. 445, which is, in substance, that a mortgagee is not entitled to the possession of the mortgaged property, and, therefore, cannot recover it in a replevin action. This rule applies only to a mortgagee whose rights are secured by a conventional chattel mortgage, which leaves the possession of the property with its owner the mortgagor. It has no appli-

at law, admitted to practice in all of the courts of the state of Washington, and has at all times herein mentioned practiced as such attorney at law in the city of Wenatchee, Chelan county, Washington.

"II. That in the month of May, 1912, C. Victor Martin, as attorney for the plaintiff, commenced an action in the superior court of Chelan county, which said case was numbered 1455 and entitled 'George W. Brisky on his own behalf and as executor of the estate of Mary F. Brisky, deceased, plaintiff, v. Leavenworth Logging, Boom and Water Power Company, a corporation, and Lamb-Davis Company, a corporation, defendants.' That in said action said C. Victor Martin sought to recover for plaintiff the sum of $32,000 for damages done to plaintiff's land by defendants through the construction of a dam across the Wenatchee river. That in said action plaintiff only sought to recover for the damage done to the land for the period from May, 1910, to December, 1911, having before the institution of said action recovered a judgment against the defendants for damages for the years 1908 and 1909.

"III. That subsequent to the institution of said action, and on or about the 3rd day of January, 1913, C. Victor Martin, acting on behalf of plaintiff and as a representative of certain of the heirs of Mary F. Brisky, entered into an agreement with the defendants in said action for the settlement and adjustment out of court of all damages done to plaintiff's land during the years 1910 and 1911, involved in said action, and also of all damages caused during the year 1912. That in said agreement provision was also made for the payment by defendants to plaintiff of a certain sum per year for each year thereafter that they caused the land of plaintiffs to be overflowed.

"IV. That said defendants paid to said C. Victor Martin, for and on behalf of his clients, in full settlement of all claims for damages for the years 1910, 1911 and 1912 the sum of $5,000, as follows: $2,000 in cash, a note for $2,000, which was subsequently paid to said attorney, and an order for $1,000 worth of lumber, which was subsequently filled under the direction of

said attorney. That after the receipt of said cash, note and order, the said C. Victor Martin moved the court to dismiss the action hereinabove described, on the ground that the same had been settled out of court, and in support of said motion made and filed an affidavit in which he swore that said action had been fully settled by the parties and that it was the desire of all parties that said case be dismissed. That, therefore, on the 27th day of March, 1913, the court entered an order on said motion dismissing said case.

"V. That said C. Victor Martin did not disclose to his clients the fact that he had received said money, note and order, or account to them therefor, and it was not until during the course of a trial of another case between the same parties in April, 1916, that it was learned that said Martin had received said sum of $5,000 or its equivalent. That since said time repeated demands have been made on said attorney for said money; but that said Martin has refused to pay over the same or any part thereof to the persons entitled thereto, but has appropriated the same to his own use.

"From the foregoing findings, the board makes the following conclusion:

"(1) That the acts and omissions of said C. Victor Martin constitute unprofessional conduct as an attorney at law and involve moral turpitude.

"Recommendation:

"The board having found that the charge filed against Mr. Martin has been fully sustained, recommends that his license to practice as an attorney at law in the state of Washington should be revoked and that he should be disbarred."

To these findings, Mr. Martin filed exceptions, submitted briefs, and twice argued the matter orally before the court *En Banc*. We have examined all of the testimony taken, carefully considered the briefs and arguments, and are convinced that the findings of the board are sustained by the evidence beyond a reasonable doubt.

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It is therefore the judgment of this court that the license heretofore granted Mr. Martin to practice law in this state be revoked, that he be disbarred, and his name stricken from the rolls.

HOLCOMB, C. J., MACKINTOSH, MAIN, FULLERTON, MOUNT, MITCHELL, and PARKER, JJ., concur.

[No. 15223. Department Two. July 2, 1919.]

ANNE LIEBIG, *Appellant*, v. ARTHUR T. LIEBIG, *Respondent*.[1]

APPEAL (71) — DECISIONS REVIEWABLE — REDUCING ALIMONY. An order reducing alimony is an order affecting a substantial right and therefore appealable.

SAME (67)—DECISIONS REVIEWABLE—RECEIVERS. An order refusing to appoint a receiver is an order from which an appeal may be taken under the statute.

SAME (379, 380)—REVIEW—INTERLOCUTORY ORDERS—APPEAL FROM FINAL JUDGMENT OR SPECIFIC ORDER. Rem. Code, § 1716, providing that an appeal from a final judgment shall bring up for review any order made in the same action or proceeding, refers to interlocutory orders occurring in the trial of the case; and an appeal from an order quashing a writ of garnishment to enforce a judgment of alimony does not bring up for review prior orders made reducing the alimony or refusing to appoint a receiver in prior proceedings relating to the alimony and its enforcement.

GARNISHMENT (55)—QUASHING—FAILURE TO FILE BOND. A writ of garnishment is properly quashed where it was sued out to collect unpaid alimony, for which there was no judgment in any specific amount, and the plaintiff failed to give any bond, as required by Rem. Code, § 681, in case the garnishment was based on Id., § 680, subdiv. 2, authorizing a garnishment where plaintiff sues for a debt and makes affidavit that such debt is just, due and unpaid.

Appeal from orders of the superior court for King county, Smith, J., entered November 24 and June 1, 1917, and from an order entered February 8, 1918, quashing a writ of garnishment. Affirmed.

[1]Reported in 182 Pac. 605.

Robert A. Devers and *Edward Judd,* for appellant.
F. J. Carver and *M. M. Pixley,* for respondent.

MOUNT, J.—On December 20, 1910, a decree of divorce was granted to plaintiff. This decree awarded to "plaintiff, for her support and maintenance and until further ordered by the court herein, the sum of forty dollars ($40) per month, . . ." Thereafter, on April 26, 1917, defendant filed a petition for a modification of the original decree. Upon a hearing of that petition, the court, on June 1, 1917, entered an order reducing the alimony to five dollars per month "until further order of the court herein." Thereafter, on June 19, 1917, plaintiff filed a petition alleging, that there was due to her $2,490 by the terms of the original decree; that defendant had refused to pay this sum; and that he had fraudulently transferred property to the names of other persons. This petition prayed for the appointment of a trustee to take charge of such property, and that defendant be required to show cause why he should not be punished for contempt for failure to make the payments provided for in the original decree. Thereafter, on November 24, 1917, after issues were joined, a hearing was had and the court denied the application and refused to appoint a trustee, and refused to find defendant in contempt. On January 28, 1918, plaintiff filed an affidavit alleging that defendant was indebted to her in the sum of $2,400, and that the Issaquah State Bank was indebted to defendant and had under its control property belonging to defendant. A writ of garnishment was issued by the clerk upon this affidavit and was served upon the Issaquah State Bank, which made answer that it was indebted to defendant in the sum of $627.01. Thereupon defendant, on February 1, 1918, filed a petition to quash the writ of

garnishment, upon the ground that it was improperly and wrongfully issued and because there was no money judgment against defendant. This petition was sustained and the writ discharged. Thereupon, on February 8, 1918, plaintiff gave notice of appeal

"from the order and judgment entered in said action on the 24th day of November, 1917, refusing to set aside an order previously entered on the 1st day of June, 1917, and takes an appeal from another order entered on the 24th day of November, 1917, refusing to appoint a receiver, and takes an appeal from another order entered on the 8th day of February, 1918, quashing a writ of garnishment."

The order referred to in this notice as of the 1st day of June, 1917, was the order reducing the alimony from $40 to $5 per month. The order entered on the 24th day of November was an order refusing to vacate that judgment. The order reducing the alimony was an order which affected a substantial right and was, therefore, appealable. The order of the 24th day of November, 1917, was the order refusing to appoint a receiver. This was also an order from which an appeal might be taken under the statute. No appeals were taken from either of these orders within the time provided by law, and they, therefore, are not reviewable at this time.

The appellant contends that, because the statute, Rem. Code, § 1716, recites that an appeal from any such final judgment shall also bring up for review any order made in the same action or proceeding, either before or after judgment, the appeal from the order quashing the writ of garnishment is sufficient for review of all final orders in the case. But that does not follow. It might as well be argued that the appeal from the order denying the writ of garnishment might, at this late day, be sufficient for a review of the orig-

inal decree in the year 1910. This court has never held that such orders are orders contemplated by the statute where it says that an appeal from any such final judgment shall bring up for review any order made in the same action or proceeding, either before or after the judgment. The orders therein referred to are interlocutory orders which occur in the trial of the case, and the language there does not refer to final appealable orders where no appeal has been taken therefrom. It will therefore be unnecessary to consider any of the questions presented upon this appeal relating to the final orders of November 24, 1917, and June 1, 1917.

We are satisfied there is no merit in the appeal from the order discharging the writ of garnishment. The statute, Rem. Code, § 680, provides that the clerks of the superior courts may issue writs of garnishment:

"(1) Where an original attachment has been issued in accordance with the statutes . . .;

"(2) Where the plaintiff sues for a debt and makes affidavit that such debt is just, due and unpaid, . . .;

"(3) Where the plaintiff has a judgment wholly or partially unsatisfied . . ."

In this case it is not claimed that appellant had a judgment for a specific amount at the time the writ was applied for. It is plain from the record that appellant was claiming that respondent was indebted to her for unpaid alimony; but there was no judgment for any specific amount, and there is not now, so far as the record shows. Rem. Code, § 681, provides that:

"In the case mentioned in subdivision two of the preceding section [§ 680] the plaintiff shall execute a bond with two or more good and sufficient sureties, to be approved by the clerk issuing the writ, payable to the defendant in the suit, in double the amount of the debt claimed therein, conditioned that he will prosecute his suit and pay all damages and costs that may

be adjudged against him for wrongfully suing out such garnishment."

If there was any ground for the issuance of a writ of garnishment it was under subdivision two of the statute above referred to. In that case it was necessary for a bond to be given. No bond was given, and the court, therefore, properly held that the writ was wrongfully issued.

We find no merit in the appeal, and the judgment is therefore affirmed.

HOLCOMB, C. J., FULLERTON, and PARKER, JJ., concur.

[No. 15229. Department One. July 2, 1919.]

THE STATE OF WASHINGTON, *Respondent*, v. PETER DERICHO, *Appellant*.[1]

INTOXICATING LIQUORS (42)—INFORMATION—PREVIOUS CONVICTION OF DEFENDANT—STATUTES. The initiative prohibition act, Rem. Code, § 6262-32, authorizing increased punishments on subsequent convictions and requiring prosecuting attorneys to allege a previous conviction in the information, is a proper police regulation to discourage violations of the law, and not open to the objection that it deprives the accused of a fair trial.

CRIMINAL LAW (460)—PUNISHMENT—SUBSEQUENT OFFENSES. In a second prosecution under the initiative prohibition act, the jury is properly instructed to find whether accused was formerly convicted, in order to empower the court to impose the increased punishment.

SAME (332)—VERDICT—RECOMMITMENT. Where the verdict is incomplete, failing to find as to a previous conviction, the court may recommit the verdict to the jury with proper instructions.

SAME (373, 460) — JUDGMENT—CONCLUSIVENESS—SECOND CONVICTION. Under the initiative prohibition act, authorizing increased punishments for subsequent convictions, a former conviction under the act is conclusive and may not be collaterally attacked by showing that the accused was not guilty.

Appeal from a judgment of the superior court for King county, Jurey, J., entered September 21, 1918,

[1]Reported in 182 Pac. 597.

upon a trial and conviction of violating the state-wide prohibition law. Affirmed.

William Wray, for appellant.

Fred C. Brown and *T. H. Patterson,* for respondent.

TOLMAN, J.—Appellant was charged by information, under §§ 5 and 32 of initiative measure No. 2, Laws of 1915, pp. 3 and 16 (Rem. Code, §§ 6262-5, 6262-32), with the offense of knowingly, willfully and unlawfully permitting intoxicating liquors to be kept on certain premises occupied by him, with intent to sell, barter, exchange, give away, or otherwise dispose of the same, and "He, said Pete Dericho, heretofore, to wit, on the 29th day of January, 1917, in the county of King, state of Washington, before Otis W. Brinker, justice of the peace residing and sitting in Seattle precinct, King county, Washington, has been convicted of the crime of selling intoxicating liquor, and sentenced to pay a fine of fifty dollars therefor, contrary to the statute," etc., etc. From the verdict of guilty and a judgment thereon, this appeal is prosecuted.

The first error assigned is based upon the refusal of the trial court to strike from the information the allegation as to a previous conviction of the crime of selling intoxicating liquor; and it is argued that this charge had a tendency to overcome the presumption of good character, and of denying to appellant a fair and impartial trial, and prejudiced the jury against him in the trial upon the specific offense charged in the information. A sufficient answer seems to be contained in § 32 of the act (Id., § 6262-32), which requires prosecuting attorneys having knowledge of a previous conviction under the act to allege such previous conviction in the information. No reason is suggested why this is not a proper police regulation to discourage

violations of the law; and, so far as we have discovered, similar provisions of other states have been upheld whenever their constitutionality has been questioned. *State v. Findling,* 123 Minn. 413, 144 N. W. 142, 49 L. R. A. (N. S.) 449, and cases there cited.

Nor did the court err in instructing the jury to find whether or not appellant was formerly convicted, as a verdict finding a prior conviction is generally held essential to empower the court to impose the increased punishment provided by the act. *State v. Findling, supra; People v. Dueber,* 34 Cal. App. 686, 168 Pac. 578; *People v. Franklin* (Cal. App.), 171 Pac. 441; *Evans v. State,* 150 Ind. 651, 50 N. E. 820.

The third contention, that the court erred in refusing to accept an incomplete verdict, and in sending the jury out a second time to find a verdict upon the issue as to a former conviction, is also without merit.

"The rule is well settled that the court may, with proper instructions, recommit a verdict to the jury for their reconsideration, where the verdict which they have rendered is not in the proper form, where it is insufficient in substance, not responsive to or covering the issues or instructions, or is otherwise defective . . ." 38 Cyc. 1893, and cases there cited.

And lastly, appellant complains because he was not permitted to go behind the record of the former conviction and introduce evidence to show that he was not guilty of the charge upon which that conviction was based. We know of no authority to sustain such a contention, and appellant cites none. Under familiar rules, the former judgment of conviction is conclusive and may not be impeached by collateral attack unless void; and there is no suggestion here that it is void or even voidable.

The judgment appealed from is affirmed.

MITCHELL, MAIN, and MACKINTOSH, JJ., concur.

HOLCOMB, C. J., took no part.

[No. 15275. Department One. July 2, 1919.]

BLOMSKOG, ERICKSON & COTTON, *Appellant*, v. THE CITY OF SEATTLE, *Respondent*.[1]

MUNICIPAL CORPORATIONS (190, 194)—DAMAGES—REMOVAL OF LATERAL SUPPORT—DEFENSES. It is no defense to an action against a city for damages to abutting property through a regrade of a street, removing plaintiff's lateral support, that plaintiff petitioned for the improvement, and evidence thereof would have been error tending to confuse the jury on the subject of the damages.

SAME (190, 197) — DAMAGES — REMOVAL OF LATERAL SUPPORT — EVIDENCE—ADMISSIBILITY. In an action against a city for damages to abutting property through the regrade of a street removing plaintiff's lateral support, it is inadmissible for the city to show its intention and future plans for taking care of the situation or to allow expert real estate witnesses to answer questions based thereon.

EVIDENCE (214)—OPINIONS—BASIS OF. It is improper to ask experts hypothetical questions based on theoretical conjecture of the witnesses.

TRIAL (55-2) — TAKING CASE FROM JURY — PARTICULAR ISSUES. Where no evidence is given to support an affirmative defense, it should be withdrawn from the consideration of the jury.

Appeal by plaintiff from a judgment of the superior court for King county, Smith, J., entered June 29, 1918, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Reversed.

O. L. Willett and *John A. Soule*, for appellant.

Walter F. Meier and *Frank S. Griffith*, for respondent.

MACKINTOSH, J.—Appellant is the owner of property at the northeast corner of Main street and Tenth avenue, in the city of Seattle, upon which is located a building used for residential purposes. In 1909 and 1910, the respondent regraded Jackson street, which runs in an easterly and westerly direction, parallel to and one

[1]Reported in 182 Pac. 571.

block south of Main street, and in that work made a seventy-two foot cut south of appellant's property. Following this cut, the hill between Main and Jackson streets began to slide, and continued in that condition up to the time of the trial of this case. In 1916, this slide invaded the appellant's property and has taken the southern portion thereof, and with it a part of the foundation and walls of the building. After having duly presented a claim against the respondent, appellant instituted this action to recover damages, alleging that the rental income of its property had been diminished, up to the time of the trial, to the extent of $12,518, and that its property had been further damaged in the sum of $19,200. The jury returned a verdict in the sum of $3,500, which the appellant, feeling to be inadequate, asks this court to set aside, insisting that the trial court was in error in denying its motion for judgment notwithstanding the verdict for the full amount prayed for in its complaint, or at least for a new trial on account of various errors claimed to have been committed.

At the trial respondent contended, and was allowed to prove, that it was then boring test holes in Washington street, which is the street parallel to Main and next north of it, for the purpose of locating the water in the hill lying above the appellant's property, and that the city intended, if water was so located, to provide means of draining such water. There was also admitted testimony to the effect that a petition had been circulated and signed by property owners and subsequently filed with the city asking for the regrade of Jackson street. This evidence did not go to the extent of showing that appellant had been a signer of that petition, and even if it had been so shown, the testimony would not have been admissible for the reason that it is no defense by the city to its

unlawful invasion of appellant's property to show that the work which occasioned such invasion had been commenced upon the request of petitioning property holders, who in their petition called upon the city to exercise its legal powers for undertaking the regrade project. *Edmonds Land Co. v. Edmonds,* 66 Wash. 201, 119 Pac. 192. The introduction of such evidence would only tend to confuse the jury and was prejudicial to appellant, in that it allowed the jury to speculate and set off against the damages to which appellant was entitled possible benefits that were not in issue in the case.

The error in admitting testimony as to the future intentions of the city and the possible results that might follow to the appellant in the event that those intentions took the form of performance presents a serious mistake by the trial court of sufficient importance to entitle the appellant to a new trial. In this connection, the jury was instructed that, "in reaching your conclusion on this point, you may take into consideration the plans and efforts now undertaken by the city to prevent or relieve the neighboring slide, whether or not this will prove effective for the purpose, so far as it affects the plaintiff's property." City officials were allowed to answer the question: "What is your intention as regards the Jackson street slide, known as the Blomskog property?" by stating what their hopes and expectations were, which were not based upon any authoritative official action of any branch of the city government. Such testimony invited the jury to browse in a boundless expanse of theoretical conjecture and afforded the appellant no opportunity to close the gates. *In re Seattle,* 102 Wash. 286, 172 Pac. 1161. The respondent was allowed to ask a real estate expert a hypothetical question based upon such evidence. It needs little citation of author-

ity to demonstrate the impropriety of such a question. 1 Wigmore, Evidence, page 672.

Among its affirmative defenses, respondent had plead that the injury to appellant's property was due to its failure to maintain a sewer. Upon the trial, no evidence was introduced in support of this defense, and the appellant requested that the defense be withdrawn from the jury's consideration. This was denied when it should have been granted. *Anderson v. Harper,* 30 Wash. 378, 70 Pac. 965; *Roe v. Standard Furniture Co.,* 41 Wash. 546, 83 Pac. 1109; *Scarpelli v. Washington Water Power Co.,* 63 Wash. 18, 114 Pac. 870; *Marks v. Seattle,* 88 Wash. 61, 152 Pac. 706.

For these errors the appellant is entitled, at least, to a new trial, and there only remains for consideration the question as to whether it is not entitled to a judgment for the entire amount sued for. The consideration of this question calls for an examination of the facts, which, in our judgment, are such that the court was correct in denying the motion and leaving to a jury the determination of the amount of damages.

The judgment is therefore reversed, and the cause remanded for a new trial.

HOLCOMB, C. J., MITCHELL, MAIN, and TOLMAN, JJ., concur.

[No. 15283. Department One. July 2, 1919.]

WILLIAM G. CLARK, *Appellant*, v. IDA CLARK, *Respondent*.[1]

DIVORCE (104) — CUSTODY OF CHILD — MODIFICATION — NOTICE. Upon application to change the custody of a child, awarded to a father who, at the time of the application, was a member of the American Expeditionary Force in France, it is error not to postpone the hearing until he had returned from military service.

Appeal from a judgment of the superior court for King county, Smith, J., entered November 13, 1918, modifying a decree of divorce as to the custody of a child, after a trial to the court. Reversed.

Walter G. Kienstra, for appellant.

Revelle & Revelle, for respondent.

MACKINTOSH, J.—In a divorce action between the respondent and appellant, the custody of their minor child was awarded to the latter. Thereafter, in the year 1918, the respondent made application for a modification of the decree, asking that the child be transferred to her custody. At that time appellant was a member of the American Expeditionary Force in France, and the hearing was conducted in his absence. The parent from whom the custody of a child is sought to be taken is affected in such a proceeding in a substantial right, and, under the circumstances of this case, it was error for the court not to have postponed the proceedings until the appellant had returned from military service.

For that reason, the judgment of the lower court is reversed.

HOLCOMB, C. J., MITCHELL, MAIN, and TOLMAN, JJ., concur.

[1]Reported in 182 Pac. 566.

[No. 15354. Department One. July 2, 1919.]

MARY SCHWALEN, *Executrix etc., Respondent,* v. FULLER & COMPANY *et al., Appellants.*[1]

TRIAL (42-1, 43)—MISCONDUCT OF COUNSEL—SHOWING INDEMNITY INSURANCE. Upon the trial of cause for wrongful death, plaintiff's counsel should not be permitted in examining the jurors on their *voir dire*, to persistently so interrogate them as to suggest that an indemnity bonding company was interested in the defense of the action.

MUNICIPAL CORPORATIONS (380, 390)—USE OF STREETS—VIOLATION OF ORDINANCE—"OBSTRUCTIONS." The operation of an automobile with the windshield so covered with rainwater that the driver could not see where he was going is not negligence, as a matter of law, as in violation of a city ordinance forbidding the operation of an automobile so constructed that the driver did not have a clear and unobstructed view; since rainwater is not an obstruction within the meaning of such ordinance.

SAME (379, 392)—COLLISION AT CROSSING—MUTUAL RIGHTS AND DUTIES—INSTRUCTIONS. Upon an issue of fact as to whether an automobile accident took place at a city crossing, giving the pedestrian the right of way, or at the street intersection, it is better, instead of one instruction, to instruct separately as to the reciprocal rights and duties of pedestrians and vehicles at crossings and intersections, and as to the greater hazard in the one case.

COSTS (83)—ON APPEAL—TAXATION—TIME FOR FILING COST BILLS. Rule 14 of the supreme court (71 Wash., p. ii) providing that the prevailing party shall within ten days after the filing of an opinion, file and serve a cost bill, and that if none is filed, the clerk shall tax certain costs, is mandatory, and a cost bill filed out of time will be struck out unless good grounds are shown for the default; and inadvertence of counsel is not a sufficient legal excuse.

Appeal from a judgment of the superior court for King county, Jurey, J., entered November 26, 1918, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Reversed.

C. J. Whittemore, Peters & Powell, and *Kerr & McCord,* for appellants.

Stanley J. Padden, for respondent.

[1]Reported in 182 Pac. 592; 187 Pac. 366.

MACKINTOSH, J.—December 15, 1917, at the intersection of Twelfth avenue and East Union street, in the city of Seattle, the deceased was run into by an automobile owned by the appellant W. P. Fuller & Company, and at the time being operated by the appellant Roy. The complaint charges, among other allegations of negligence, that the automobile was being driven at a dangerous and illegal rate of speed, and that no warning was given of its approach, and that its windshield had been allowed to become covered with rainwater so that the driver was unable to see pedestrians crossing the street. Appellant Fuller & Company, in its answer, denied that Roy was driving the automobile at the time of the accident for its use and benefit, or with its knowledge or consent, or within the scope of his employment, and also plead other affirmative defenses. The appellant Roy, in his separate answer, made similar allegations to those contained in the answer of his co-appellant. Testimony was introduced which indicated that Roy had allowed rainwater to collect on the windshield of the automobile and, by reason of that fact, the driver was unable to see where he was going, and that the accident was due to this cause. Trial resulted in a verdict for the respondent, which was not disturbed upon appellants' motion for a new trial or for judgment notwithstanding the verdict.

Counsel for the respondent, in his examination of the jurors upon their *voir dire,* ingeniously and persistently so interrogated them as to suggest that an indemnity bonding company was interested in the defense of the action. While no direct statement was made that would indicate the interest of such bonding company, yet the impression was created that such interest existed. A matter presented as was this must be left to the ethics of the profession and the discretion

of the trial judge, but where a course of conduct is persisted in apparently with the purpose of prejudicing the jury, the exercise of a wise discretion should call for a ruling which would discontinue such conduct.

A trial amendment was made to the pleadings which allowed the introduction of a city ordinance [§ 112] providing:

"No person shall drive any vehicle that is so enclosed, constructed or loaded as to prevent the driver thereof from having a clear and unobstructed view of the front, rear and on both sides . . ."

and based upon the pleading and introduction of that ordinance, the court gave the following instructions:

"I instruct you that, on December 15, 1917, it was unlawful for any person to drive any vehicle that was so enclosed as to prevent the driver thereof from having a clear and unobstructed view to the front of said vehicle."

And the further instruction that:

"You are instructed that a violation of a positive law is in itself negligence. But you are further instructed in this regard, that whether or not such negligence would entitle plaintiff to recover would depend on whether or not such negligence was the approximate cause of the injury."

The pleading, evidence and instructions in this regard were directed to the fact that, at the time of the accident, rainwater had accumulated upon the windshield to such an extent that the driver's view was impaired.

Rain, fog or snow are not "obstructions" within the meaning of this ordinance, which clearly has reference to mechanical obstructions, either permanent or temporary, in the "enclosing, construction or loading" of the vehicle, such as would prevent the free vision of the driver. Such words, in the connotation used,

cannot, without violence, be applied to natural atmospheric conditions.

There being no other evidence in the case in regard to the violation of this ordinance except that referring to rain upon the windshield, such alleged violation is not proved. The court could properly have charged the jury as to the common law negligence of the driver in permitting the windshield to become clouded and to find whether, under the circumstances, that was negligence or not and the proximate cause of the injury, but it was prejudicial error to have instructed the jury that the situation constituted negligence as matter of law. *Tergeson v. Robinson Mfg. Co.*, 48 Wash. 294, 93 Pac. 428; *Jock v. Columbia & P. S. R. Co.*, 53 Wash. 437, 102 Pac. 405; *Rastelli v. Henry*, 73 Wash. 227, 131 Pac. 643.

The traffic ordinances of Seattle give the pedestrian the right of way at street intersections or crossings in the district which was the scene of this accident. The contention of the respondent was that the collision took place upon the crossing; while the appellant's evidence tends to show that it occurred at the intersection. The court, in its instructions, combined a definition of the rights and duties at street crossings and intersections in one instruction. These instructions, possibly, were there no other error in the case, would not be sufficiently erroneous to entitle appellants to a new trial; but, upon the retrial of the case, it would be better to instruct separately as to the reciprocal rights and duties of pedestrians and vehicles at street crossings and intersections, and thus present appropriate instructions which the jury could apply to the case as they find the fact to be as to the exact location of the collision. Although the pedestrian may have the right of way at both places, the jury would have a

right to be informed that greater hazard attended the pedestrian in one situation than in the other.

The evidence claimed by appellant Fuller & Company to entitle it to judgment notwithstanding the verdict, on the ground that it showed appellant Roy was not acting under the direction of Fuller & Company or within the scope of his employment, is not sufficient to transform the question from one of fact to one of law, and the court was therefore correct in denying the motion.

We have not passed seriatim on all of the errors assigned, although we have considered them and have given a general view of such matters as we consider justify the granting of a new trial.

Judgment reversed and the cause remanded for a new trial.

HOLCOMB, C. J., MITCHELL, MAIN, and TOLMAN, JJ., concur.

ON MOTION TO STRIKE COST BILL.

[Decided December 10, 1919.]

PER CURIAM.—Respondent has moved to strike the cost bill served and filed by appellants herein from the files of the court, for the reason that the cost bill filed shows upon its face that it was not served or filed within the time provided by law and by the rules of this court. The same having been served on July 16, 1919, and the opinion of the court having been filed on July 2, 1919, more than ten days had elapsed from the filing of the opinion until the serving and filing of the cost bill.

It is contended by appellants, in resistance to the motion to strike the cost bill, that Rule 14 of this court relating to the service and filing of cost bills is not mandatory but directory only, and that it is within the

discretion of the court to enforce the same. That rule provides:

"(1) The prevailing party shall, within ten days after the filing of the opinion in a case, file with the clerk a cost bill, and serve upon the adverse party a copy thereof. If any adverse party objects to any item or items thereof, he shall serve upon the prevailing party exceptions to such cost bill, together with affidavits in support of his exceptions, if desired, and file the original, with proof of service, with the clerk of the court within ten days after service of the cost bill upon him; whereupon the clerk shall tax the costs to which the prevailing party is entitled, and shall notify the parties of such taxation. Either party may except to the taxing of any item or items, or failure to tax the same, and shall serve such exceptions on the adverse party and file the same with the clerk within ten days after such taxation. Said exceptions shall be heard by the court on the first motion day after the expiration of five days from the date of service of such exceptions. If the party fail to appear at such time, the court will consider such exceptions upon the affidavits on file and the records in the cause, and determine the same.

"(2) If no cost bill is filed and served, the clerk will tax as costs only the clerk's costs, printing of briefs at seventy-five cents per page, the statutory attorney's fee, and the cost of the transcript, statement of facts and abstracts, at the rate of five cents a folio.

"(3) Where a cost bill has been served and filed in time, and no exceptions are filed, objection thereto will be deemed to have been waived." 71 Wash., p. ii.

It is the opinion of the court that this rule is mandatory and not directory merely, and must be complied with in order that the prevailing party may have costs taxed according to its cost bill, except only in cases where good grounds are shown which would be sufficient to relieve the party in default for failure to file and serve such cost bill within the time required by the rule.

In this case, no excuse other than inadvertence of counsel for the prevailing parties, appellants, has been shown. This is not sufficient legal excuse. The motion to strike must therefore be granted, and the costs will be taxed by the clerk under the rule.

[No. 15426. *En Banc.* July 3, 1919.]

C. A. LEE, *Appellant,* v. BELLINGHAM SCHOOL DISTRICT No. 301, *of Whatcom County, Washington, et al., Respondents.*[1]

SCHOOLS AND SCHOOL DISTRICTS (35) — BONDS — NOTICE OF ELECTION—SUFFICIENCY. The requirement of Rem. Code, § 4667, as to published notice of school elections is but directory, and notwithstanding notice was published only two days instead of three, it will not invalidate an election, where it appears from the publicity given it that the voters had ample notice and the result of the election was not affected.

Appeal from a judgment of the superior court for Whatcom county, Pemberton, J., entered June 6, 1919, upon findings in favor of the defendants, in an action for an injunction, tried to the court. Affirmed.

George Downer, for appellant.

Kellogg & Thompson, for respondents.

TOLMAN, J.—Appellant brought this action on behalf of himself and other taxpayers of Bellingham School District No. 301, of Whatcom county, Washington, to enjoin the district and the directors thereof from issuing and selling certain proposed bonds of the district, and praying that the bonds be declared to be void.

It appears that, on May 24, 1919, a special election was held in said school district for the purpose, among other things, of voting upon the proposition of the

[1]Reported in 182 Pac. 580.

issuance of $75,000 of bonds to be used in providing certain betterments, and $75,000 of bonds to be used for refunding warrants of the district then outstanding. All of the proceedings leading up to the election are conceded to be regular, except the publication of the official notice of the election. The statute requires, Rem. Code, § 4667:

"Said notices shall also be published three times in two daily papers published in the district, and if there be no daily or dailies, then in the weekly paper or papers in three regular issues next preceding the day of such election."

It is conceded that a notice, regular in form, was published on May 22 and May 23 in one daily paper, and on May 22, May 23, and May 24, in another daily paper published in said district; and the attack here is directed solely to this defective publication, which amounted in fact to two publications only in each paper, as the publication on May 24, being the day of the election, did not precede the day of the election.

We have before us the findings of fact of the trial court, from which it appears that, on the 29th day of April, 1919, the board of directors adopted the resolution calling for the special election; that the printed notices of the election were duly posted at least twenty days previous to the day of election, and that, commencing on the first day of May, public meetings were held in the several school buildings of the district; the question of the authorization of the bond issue was discussed at such meetings, and publicly discussed throughout the district; that a publicity committee was organized early in May, which arranged and conducted such meetings and prepared and published data and articles in the newspapers generally with reference thereto; that various civic organizations took up and discussed the matter of the bond issue; that the news-

papers published in said district, of which there were three dailies having a large circulation among the residents and electors of the district, began as early as May 1, and continued until the day of the election, to print and publish almost daily many news articles and editorials of and concerning the proposed bond issue and the election to be held with reference to the same, all of which published articles referred to and called the attention of the voters to the date of such special election, and advised and urged the voters to register and vote at such election.

And the court further found:

"That by reason of the several meetings of the electors of said school district held as hereinbefore set forth, and by reason of the articles and editorials published in the several newspapers in the city of Bellingham, in said school district between May 1, 1919, and May 24, 1919, and widely and extensively circulated among the electors of said school district, all of the electors of said Bellingham School District No. 301 were advised of and had notice of the proposed special election to be held in said school district on May 24, 1919, for the purpose of determining whether said school district should issue bonds in the aggregate amount of $150,000 for the purposes as hereinbefore set forth, and that the electors of said school district, by reason of the said meetings and the said publication of the said articles in the several newspapers, as hereinbefore set forth, had greater notice of the said election to be held on May 24, 1919, and the proposed issuance of bonds by said school district to be voted on at said election than said electors would have had by the publication of any official notice of such election, and that no elector of said school district was denied the privilege of voting at such special election for want of notice of such special election, and that the result of said special election would not have been different had any other or different official notice of such election been published by the board of directors of said school district for any greater length of time than the

official notice of such election published by and under the direction of the board of directors of such school district."

In the light of all of the facts which have been found by the trial court, and which are not disputed, we are constrained to hold that this case falls squarely within the rule laid down in *Rands v. Clarke County*, 79 Wash. 152, 139 Pac. 1090. In that case the previous decisions of this court upon the subject of the giving of notice of an election, either general or special, were collated and discussed, and the rule was there approved and adopted which had been laid down as early as the case of *Seymour v. Tacoma*, 6 Wash. 427, 33 Pac. 1059, to the effect that the requirements of a statute, such as the one now under consideration, providing for the giving of notice of an election are directory rather than mandatory, and notwithstanding a defective or improperly published notice, the election will be held valid, unless the statute itself declares that the election shall be void if the statutory requirements are not strictly observed, or the court can see from the record that the result of the election might have been different had there been a strict compliance with the statutory requirements. We do not wish in any manner to extend or broaden the rule referred to. The action of the officials of the district in failing to publish notice according to the letter of the statute cannot be commended, nor should others be encouraged to follow such a course. It clearly appears, however, from the findings of the court in this case, that the voters generally were fully advised of the date and purpose of the special election; that no one was denied the privilege of voting for want of notice; and that the result of such election would not have been different had the official notice been published strictly in accordance with the terms of the statute. Hence we

are constrained to follow the rule which has so long been the law of this state; the more so that the legislature, knowing the law, as it is presumed to, has not seen fit to amend it so as to provide that an election shall be void if the statutory requirements are not strictly observed.

Judgment affirmed.

All concur.

[No. 15025. Department One. July 7, 1919.]

THE STATE OF WASHINGTON, *Respondent*, v. JAMES J. CALLAGHAN, *Appellant*.[1]

INDICTMENT AND INFORMATION (74)—DUPLICITY—WAYS OR MEANS OF COMMITTING OFFENSE—LARCENY BY FALSE PRETENSES. An indictment for aiding and abetting in obtaining $130 by false pretenses is not duplicitous in that it shows that the money was obtained by forging and presenting to the county thirteen false or invalid claims for ten dollars each, the averment as to the obtaining of money being single.

APPEAL (263)—RECORD—STATEMENT OF FACTS. In the absence of statement of facts or bill of exceptions, the supreme court cannot pass upon any question as to the instructions.

Appeal from a judgment of the superior court for King county, Frater, J., entered May 18, 1918, upon a trial and conviction of grand larceny. Affirmed.

William R. Bell, for appellant.

Alfred H. Lundin and *Frank P. Helsell*, for respondent.

MAIN, J. — By indictment, Lester Gandolfo and James J. Callaghan were charged with the crime of grand larceny, the former as principal and the latter as aider and abettor. The cause went to trial against Callaghan alone, and resulted in a verdict of guilty.

[1]Reported in 182 Pac. 594.

From the judgment entered after verdict, he appeals.

No statement of facts or bill of exceptions has been brought to this court, and, therefore, the only question which can now be considered relates to the indictment. This was demurred to on the ground, among others, that it charged more than one crime. The only question to be determined is whether the indictment was duplicitous.

The indictment is too long to be here set out in full, but the facts therein stated may be summarized as follows: James J. Callaghan, the appellant, was commissioner of public welfare of King county, Washington, and was the authorized representative of the county for the disbursement of its funds for the relief of poor and indigent residents.

On the 27th day of August, 1917, Gandolfo represented to the board of commissioners of King county that Gandolfo & Company, a corporation, had furnished groceries and supplies of the value of $10 to each of thirteen different persons, giving the name and street address of each. At the same time, he presented to the board of commissioners a claim against King county in the sum of $130. This claim consisted of thirteen false and fraudulent written orders, signed by J. J. Callaghan, the appellant, each for the sum of $10, and purporting to be signed by the persons named therein. The board of county commissioners, believing the false pretenses and representations made by Gandolfo and relying thereon, allowed the claim and authorized its payment. The county auditor delivered to Gandolfo a warrant against the county in the sum of $130, payable to Gandolfo & Company. Gandolfo presented this warrant to the proper officer of King county and received thereon the sum of $130 in lawful money.

The pretenses and representations made by Gan-

dolfo were false and untrue. No groceries or supplies had been delivered to any of the persons named. The orders were wholly false and fraudulent. The signatures of all the parties upon the back of the orders, purporting to acknowledge receipt of the supplies mentioned therein, were forged.

The appellant, as commissioner of public welfare for King county, had aided and abetted Gandolfo in obtaining the money, in the manner specified. The appellant had signed and delivered the orders to Gandolfo, knowing and intending that the orders were to be presented as a claim to King county by Gandolfo & Company, by Lester Gandolfo, without any groceries or supplies of any kind having been delivered to the persons named in the orders, and knowing that the signatures of the persons named therein would be forged upon the orders and that the forged orders would be presented as a claim and paid by the county. All the acts done were with the intent to deprive and defraud the county of the sum of $130.

The appellant claims that the indictment charges thirteen separate and distinct offenses and is, therefore, bad for duplicity. The respondent claims that but one offense is charged, which was the obtaining of $130 from King county. The position of the respondent is correct. The gist of the offense was the obtaining of the money by fraudulent and false pretenses. All of the steps taken leading up to the obtaining of the money were preliminary to the act. The rule is that, where a single offense may be committed in different ways, or by different means, it may be charged in the information to have been committed by more than one of the ways or means, provided the ways or means charged are not repugnant to each other. *State v. Pettit*, 74 Wash. 510, 133 Pac. 1014; *State v. Gaul*, 88 Wash. 295, 152 Pac. 1029; *State v. Wingard*,

92 Wash. 219, 158 Pac. 725. The same rule applies when any number of false pretenses or representations may be used in consummating the final act or purpose to be accomplished by such false pretenses or representations. Bishop's New Criminal Law, § 434.

In *People v. Luttermoser,* 122 Mich. 562, 81 N. W. 565, the defendant was charged with obtaining money by false claims from a township. He was a justice of the peace and a member of the township board. He wrote out four orders in payment of claims against the township and increased each of them $10 above what they should have been. Thereafter he presented these four orders to the treasurer of the township and obtained the money thereon. There, as here, the objection was made that the information was bad for duplicity. In disposing of this case the court said:

"The gist of the offense was the obtaining the money by the presentation of false or invalid orders. When this is stated, it answers the further objection that the information is bad for duplicity because in the same count several distinct, petty offenses are alleged, as these supposed distinct offenses consist of obtaining these several orders, but the averment as to obtaining the money is single."

In the indictment in the present case, the averment as to the obtaining of money is single. But one offense is charged, even though it may have been consummated by a number of false and fraudulent representations.

Some objection is made to the instructions, but this cannot be considered. There being no statement of facts or bill of exceptions here, the court cannot pass upon any question as to the instructions. *Morgan v. Bankers Trust Co.,* 63 Wash. 476, 115 Pac. 1047.

The judgment will be affirmed.

MOUNT, MITCHELL, and TOLMAN, JJ., concur.

HOLCOMB, C. J., took no part.

[No. 15210. Department One. July 7, 1919.]

E. M. GORDON *et al., Respondents,* v. C. D. HILLMAN *et al., Appellants,* NATIONAL CITY BANK *et al., Garnishee Defendants.*[1]

EXECUTION (10)—PROPERTY SUBJECT—EQUITABLE INTEREST IN NOTE. The equitable or reversionary interest of the payee of a promissory note, pledged by him as security for a debt, may be sold on execution, under Rem. Code, § 518, providing that all property of the judgment debtor not exempt by law shall be liable to execution.

GARNISHMENT (46)—TRAVERSE OF ANSWER AND ISSUES THEREON. A garnishee's answer that it held, as trustee, a note belonging to the judgment debtor for $94,777, pledged to it as security for $14,338, and alleging that the maker of the note claimed an offset amounting to $70,000, is controverted, within Rem. Code, § 712, requiring the issue to be tried out, where the debtor answered alleging fraud and collusion between the plaintiff and the maker of the note to obtain an unfair sale at public auction to the debtor's loss; and it is error to order a sale before the issue is tried and the offset of the maker is determined.

Appeal from an order of the superior court for King county, Smith, J., entered September 20, 1918, directing the delivery of property to the sheriff for sale on execution, in garnishment proceedings. Reversed.

Gay & Griffin and *Geo. H. Rummens,* for appellants.

Byers & Byers and *Aust & Terhune,* for respondents.

TOLMAN, J.—Respondent is a judgment creditor of appellant C. D. Hillman, and heretofore duly caused a writ of garnishment to issue in the cause, directed to the garnishee defendants. The Title Trust Company answered, admitting that it held, as trustee, a note in the principal amount of $100,755, executed by C. K. Sturtevant and wife, payable to it as trustee on or before July 1, 1919, which note is secured by a mortgage, also running to it as trustee, on certain real

[1]Reported in 182 Pac. 574.

estate in Snohomish county. It further admits that it holds the note and mortgage as trustee for C. D. Hillman, under a written trust agreement, which is made a part of its answer; that payments have been made on the note, and the amount now owing thereon is $94,777.54, to which the makers claim an offset; that the note and mortgage have been assigned by Hillman to the National City Bank; and alleges that there is due to it for its services as trustee the sum of $100.

The answer of the National City Bank sets out the assignment of the note and mortgage made by Hillman to it, which provides that it is made to secure the payment of any and all indebtedness then or thereafter incurred which may became due from Hillman to the bank, and that the indebtedness so secured at the time of the service of the writ was $14,338.76.

Sturtevant answered, admitting the execution of the note and mortgage for the benefit of Hillman, also alleges the assignment thereof by Hillman to the bank, sets up certain payments, and states the balance owing on the note according to its terms to be $94,777.54, but alleges that the consideration for the note has failed in part and that he, Sturtevant, has certain counterclaims or offsets against the Title Trust Company as trustee and against Hillman amounting to some $70,000, and denies any liability on the note in excess of $24,000.

Hillman and wife also answer and set out the execution of the note and mortgage, allege the assignment in good faith to the bank, and further allege that there is collusion between respondent and Sturtevant and that the garnishment writ was procured as a part of a fraudulent scheme to have the note and mortgage sold at auction, to their loss and injury.

Upon the writ and several answers, respondent moved for an order requiring the delivery of the note

and mortgage to the sheriff of King county for sale on execution, and the trial court entered an order granting such motion, but providing that there first be paid out of the funds of such execution sale $14,338.76 to the bank in full of the amount due it, and that the trust company be paid its claim of $100 for services, from which order this appeal is taken.

It is contended that Hillman's interest in the note and mortgage, being an equitable one only, is not subject to sale on execution; and many authorities are cited to show that such was the rule at common law. Our statute has, however, removed this question from the realm of the common law. Rem. Code, § 518, provides:

"All property, real and personal, of the judgment debtor, not exempt by law, shall be liable to execution."

Under this statute, it was held in *Calhoun v. Leary*, 6 Wash. 17, 32 Pac. 1070, that an equitable interest in land will be divested by sale under execution, and we are not now disposed to limit the statute. But, though appellant's interest in the note and mortgage might pass on execution sale, it does not necessarily follow that the order appealed from must be affirmed. Appellant's answer raised the question of fraud and collusion. For the sheriff to sell with this issue undetermined would, no doubt, result in loss to appellant Hillman; especially so, as his interest in the note, if Sturtevant's offset should not be sustained, greatly exceeds the amount due on the judgment, and no bidder could be expected, in the light of Sturtevant's undetermined claim, to bid anything approaching what would be the value with Sturtevant's claim eliminated, or even liquidated. The garnishment statute itself provides the remedy (Rem. Code, § 702), to the effect that, if the answer of the garnishee be controverted,

an issue shall be formed and tried as other cases. As we have seen, the answer of the garnishee defendant Sturtevant is controverted as to the good faith of the proceeding, and the trial court should have proceeded to form issues as to the rights and liabilities of the several parties and try out those issues before ordering the note and mortgage surrendered to the sheriff for sale on execution.

Reversed, and remanded with instructions to proceed in accordance with the views herein expressed.

HOLCOMB, C. J., MACKINTOSH, MAIN, and MITCHELL, JJ., concur.

[No. 15222. Department One. July 7, 1919.]

J. B. ROSS, *Respondent*, v. SMITH & BLOXOM, *Appellant*, LOUIS STEREOS *et al.*, *Defendants*.[1]

MUNICIPAL CORPORATIONS (390)—AUTOMOBILE COLLISION—CAUSE OF ACCIDENT—QUESTION FOR JURY. Whether the negligence of the defendant in maintaining an unlawful obstruction on the street was a contributing cause to the injury of a bystander, when two automobiles collided at a street intersection, is a question for the jury, where one of the drivers in collision testified that boxes piled by the defendant at the curb obstructed his view.

NEGLIGENCE (14, 15)—PROXIMATE CAUSE. An act to be the proximate cause of the injury must be a cause but for which the injury would not have been suffered.

MUNICIPAL CORPORATIONS (384, 392)—NEGLIGENCE (15)—PROXIMATE AND CONCURRING CAUSE—INSTRUCTIONS. Where the drivers of two colliding automobiles, and a storekeeper who had obstructed the view by piling boxes at the street intersection, are all three charged with concurring negligent acts, each charged to be the proximate cause of an injury to a bystander, and the evidence that the obstruction contributed to the injury is not satisfactory, it is error to refuse a requested instruction to the effect that the obstruction would not be a proximate cause if the injury would have resulted without the

[1]Reported in 182 Pac. 582.

concurrence of the obstruction; under the rule that an act to be the proximate cause of an injury must be a cause "but for which" the injury would not have been suffered.

Appeal from a judgment of the superior court for King County, Davidson, J., entered September 20, 1918, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a pedestrian struck by an automobile. Reversed.

Peters & Powell, for appellant, contended, *inter alia,* that concurring negligence, to be an approximate cause, must be a cause "but for which" the injury would not have been suffered. 29 Cyc. 396, 489, 498; Sedgwick, Damages (9th ed.), p. 199; *Hellan v. Supply Laundry Co.,* 94 Wash. 683, 163 Pac. 9; *Bullis v. Ball,* 98 Wash. 342, 167 Pac. 942; *Stronjny v. Griffin Wheel Co.,* 116 Ill. App. 550; *Louisville Gas Co. v. Kaufman,* 20 Ky. Law 1069, 48 S. W. 434; *Franke v. Head,* 19 Ky. Law 1128, 42 S. W. 913; *O'Connor v. Brucker,* 117 Ga. 451, 43 S. E. 731; *Strobeck v. Bren,* 93 Minn. 428, 101 N. W. 795; *Kappes v. Brown Shoe Co.,* 116 Mo. App. 154, 90 S. W. 1158; *Koch v. Fox,* 71 App. Div. 288, 75 N. Y. Supp. 913; *Johnson v. Northwestern Telephone Exchange Co.,* 48 Minn. 433, 51 N. W. 225; *Stone v. Boston & A. R. Co.,* 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794; *Missouri Pac. R. Co. v. Columbia,* 65 Kan. 390, 69 Pac. 338, 58 L. R. A. 399; *Nelson v. Narragansett Electric Lighting Co.,* 26 R. I. 258, 58 Atl. 802, 106 Am. St. 711, 67 L. R. A. 116.

Where a new cause intervenes, the connection is broken. 21 Am. & Eng. Ency. Law (2d ed.), pp. 496, 516; *Scale v. Gulf, C. & S. R. Co.,* 65 Tex. 274, 57 Am. Rep. 602; *Texas & Pac. R. Co. v. Dougherty,* 15 S. W. (Tex. App.) 44.

Henry W. Pennock and *James R. Gates,* for respondent, contended, among other things, that the instruc-

tions as to proximate cause were proper and sufficient. *McDorman v. Dunn,* 101 Wash. 120, 172 Pac. 244; *Eskildsen v. Seattle,* 29 Wash. 583, 70 Pac. 64; *Akin v. Bradley Eng. & Mach. Co.,* 48 Wash. 97, 92 Pac. 903, 14 L. R. A. (N. S.) 586; *Frostman v. Stirrat & Goetz Inv. Co.,* 65 Wash. 608, 118 Pac. 742; *Jaquith v. Worden,* 73 Wash. 349, 132 Pac. 33, 48 L. R. A. (N. S.) 827; *Thoresen v. St. Paul & Tacoma Lumber Co.,* 73 Wash. 99, 131 Pac. 645, 132 Pac. 860; *Hellan v. Supply Laundry Co.,* 94 Wash. 683, 163 Pac. 9; *Hubbard v. Tacoma Eastern R. Co.,* 101 Wash. 158, 172 Pac. 222.

If the intervening act might reasonably have been foreseen, the original negligence will still be regarded as the proximate cause. *Daneschocky v. Sieble,* 195 Mo. App. 470, 193 S. W. 966; *Weick v. Lander,* 75 Ill. 93; *Louisville Home Tel. Co. v. Gasper,* 123 Ky. 128, 93 S. W. 1057, 9 L. R. A. (N. S.) 548; *Gonzales v. Galveston,* 84 Tex. 3, 19 S. W. 284, 31 Am. St. 17; *Missouri, K. & T. R. Co. of Texas v. Ryon,* 177 S. W. (Mo.) 525; *McKune v. Santa Clara Valley Mill & Lumber Co.,* 110 Cal. 480, 42 Pac. 980.

TOLMAN, J.—Respondent brought this action to recover for personal injuries sustained by him, alleging and proving substantially the following facts: At the time of the accident, which occurred at the intersection of Madison street and Western avenue, in the city of Seattle, respondent stood on the sidewalk at the southeast corner of the intersection of the streets mentioned, engaged in conversation with friends. A Ford automobile, owned and driven by defendant Stereos, came down Western avenue from the north, at a speed estimated all the way from twelve to thirty-five miles per hour. At the same time an Overland car, owned and driven by defendant Wilson, came up Madison street from the water-front, going at a speed

of from twelve to twenty miles per hour. At the northwest corner of the intersection of these streets were the premises occupied by appellant, wherein it carried on a commission business, handling produce of various sorts. On the sidewalk, both on the Western avenue and Madison street fronts, were piled boxes and crates of fruits and vegetables to a height of four to six feet, extending along the curb continuously, except that there was a space left open at the corner for the passage of pedestrians along each street. Under these conditions, Wilson, approaching from the west, turned his machine into Western avenue (as to whether or not he cut the corner in so doing, there is a dispute) and immediately came into collision with the Ford car driven by Stereos, which had been traveling two and a half or three feet from the westerly or right-hand curb on Western avenue. In attempting to avoid the collision, or deflected by the collision, the Ford car driven by Stereos turned from its course and ran across to the southeast corner of the intersection, up onto the curb, and jammed respondent against the lamp post, fracturing his left leg so that it had to be amputated below the knee. Damages were claimed against Stereos (and wife) upon the ground that he was negligent and reckless in driving his car at a high, dangerous, and unlawful rate of speed; against Wilson (and wife) upon the ground that he was driving at an illegal and excessive rate of speed, and because he was cutting across the corner of the intersection, making a short, sharp turn, and unlawfully intersecting the course of the Stereos car; and against appellant, "that the collision between the automobile driven by the defendant Louis Stereos and that driven by the defendant Benjamin Wilson, and the consequent injury to plaintiff, were the natural and probable result of the act of the defendant Smith

& Bloxom in maintaining an encroachment on said streets whereby the drivers of vehicles approaching each other in the manner aforesaid were deprived of the usual view to be obtained across the sidewalk space; that the unlawful and negligent obstruction of the view by defendant in the manner aforesaid accentuated the negligence of the defendants Louis Stereos and Benjamin Wilson and contributed directly to and caused the injury to plaintiff." From a verdict and judgment thereon against each and all of the defendants, appellant Smith & Bloxom alone appeals.

It is first urged that there was no substantial evidence to the effect that the boxes piled in front of appellant's premises had anything to do with the cause of the accident. We have carefully examined the evidence, and while it is by no means clear or satisfactory, yet defendant Stereos did testify that the boxes obstructed his view, and the question thus became one of fact for the jury.

Were the principles of law applicable clearly given to the jury in the instructions of the court? The court instructed:

"While there can be but one recovery of damages for an injury, the law holds all those whose negligent acts directly contributed or united in causing the injury liable both jointly and severally to the person injured. I instruct you that if you shall find from a fair preponderance of the evidence that the plaintiff was injured as a proximate result of the concurrent or combined negligence of two or more of the defendants, and that the defendants whose acts of negligence so concurred or combined, in the exercise of ordinary care and prudence, should have foreseen that an injury would naturally and probably have resulted from their negligence, then all defendants so contributing to plaintiff's injury are jointly and severally liable."

This instruction, we think, fairly states the law, as far as it goes. But in a case such as this, where three

defendants were charged with concurring negligent acts, each charged to be the proximate cause of the injury, and where each appeared separately and engaged in defending himself by attempting to show negligence on the part of the other, was this enough? Appellant requested instructions in part as follows:

"In the present case, if you should find that the premises of the defendant Smith & Bloxom were kept in a manner so as to be an unlawful obstruction to the view of the defendants driving their automobiles at these street intersections, and yet you should find that the manner in which the defendants operated their automobiles, or either of them, was such in itself as to be sufficient to produce this collision and injury to the plaintiff, without the concurrence of any obstruction on the defendant Smith & Bloxom's premises, then I charge you that you could not hold Smith & Bloxom liable in this case, because their negligence, if any, would not have been the proximate or efficient cause."

The act, to be the proximate cause of the injury, must have been such that without it the injury would not have happened. 29 Cyc. 489.

"The defendant may have been negligent and the plaintiff may have suffered injury and a causal connection between the two may have been proved; but obviously this is not enough, for there are other causes which have contributed to produce the loss or damage. The essential point in law is that the connection must be proved to be *necessary;* the negligence must be a cause *but for which* the injury would not have been suffered." 1 Sedgwick, Damages (9th ed.), 199.

This principle is clearly recognized in *Hellan v. Supply Laundry Co.,* 94 Wash. 683, 163 Pac. 9, where it is said:

"Respondent further argues that the accident would not have happened had Corkum stopped the car or had he been running at a lawful rate of speed. This may be conceded. But it is equally true that, not-

withstanding his failure to stop and notwithstanding his excessive speed, no accident would have happened had respondent's truck been stopped, or had it been running at a lawful rate of speed, or had it even kept to the right side of the intersection and the right side of the street."

When it is borne in mind that the *Hellan* case was proceeding to trial against one defendant only, and no question of instructions was involved, but only the question of whether or not the court could determine, as a matter of law, whose negligence was the proximate cause of the injury, it will be seen that there is nothing in that case out of harmony with the rule hereinabove stated, and that the case as a whole supports the rule. This rule was also clearly recognized in *Bullis v. Ball,* 98 Wash. 342, 167 Pac. 942, where this court approved an instruction which told the jury that it must find that the accident would not have happened without the act complained of, before it could find such act to be the proximate cause. Nor do we think this court has ever denied the rule where, as here, it would be applicable. We have carefully examined all of the cases cited by respondent and find nothing which seems to militate against the rule, except possibly some language in the case of *Jaquith v. Worden,* 73 Wash. 349, 132 Pac. 33, 48 L. R. A. (N. S.) 827. When the facts in that case are examined, it clearly appears that the "but for which" doctrine would not be there applicable to the extent that it is here, because there the acts of each of the defendants combined to cause the accident, and without the act of negligence of each, no accident could have occurred. In discussing the requested instruction thought to be based upon the "but for which" rule, which the trial court had refused to give, the court there said:

"We think there was no error in this respect. Assuming the negligence of the Murphys, it is obvious that the concurring negligence of all the parties caused the injury. The standing machine was harmless until it was struck by the machine of these appellants. When these agencies met, the one active, the other passive, a new condition was created which culminated in the respondent's injury."

But whether or not the court then had in mind the "but for which" doctrine, it approved in that same case an instruction given on behalf of appellant Murphy in the following language:

"If you believe from a fair preponderance of the evidence that the accident and injury to the plaintiff occurred by reason of negligence on the part of the defendant Wade, and that the defendant Edward D. Murphy was also negligent, either by his own act or by the act of the defendant Floyd B. Murphy, done or performed with his authority, expressed or implied, and that *but for the negligent act of the defendants Murphy the accident would not have occurred,* then and in that event you should find a verdict against all of the defendants." [The italics we have supplied for this occasion.]

This doctrine is generally recognized in other states. *Strojny v. Griffin Wheel Co.,* 116 Ill. App. 550; *Johnson v. Northwestern Tel. Exchange Co.,* 48 Minn. 433, 51 N. W. 225; 29 Cyc. 489, and cases there cited. The nature of the negligence charged as against appellant as compared with the negligence charged against the other defendants, the uncertain and unsatisfactory nature of the testimony tending to show that the act of appellant in piling boxes upon the sidewalk entered into the matter at all, and the conflicting interests of the several defendants, all tend to make this peculiarly a case in which the attention of the jury should have been directly and squarely called to the rule of law which we have been discussing; and

proper instructions upon that subject having been requested, it was error to refuse to give them.

The judgment, as to the appellant only, is reversed and the cause remanded for a new trial.

HOLCOMB, C. J., MACKINTOSH, MAIN, and MITCHELL, JJ., concur.

[No. 15131. Department Two. July 8, 1919.]

DOROTHY PIERCE *et al.*, *Respondents*, v. GLOBE & RUTGERS FIRE INSURANCE COMPANY, *Appellant*.[1]

INSURANCE (132, 188)—PROOFS OF LOSS—QUESTIONS FOR JURY. The failure of the insured, without reasonable cause, to appear for examination under oath, as required by a fire insurance policy, is a question for the jury, where it appears that, before the time appointed, he was arrested for arson at the instance of a representative of the company and committed to jail and was unable to obtain his release on bail until two or three days after the day set, and no further demand and no attempt was made to examine him while in jail.

SAME (132)—STATEMENTS OF LOSS—PLACE FOR EXAMINATION. The proper place for an examination of the insured is where the loss occurred, and the company has no right to demand that it take place elsewhere.

SAME (120)—RISKS—VALUE OF PROPERTY. Where buildings are totally destroyed by fire, any recovery must be for the amount stated in the policy, under Rem. Code, § 6059-105½, providing that the same shall be conclusive as to the value.

SAME (189)—VALUE OF PROPERTY DESTROYED—INSTRUCTIONS. An instruction relating to the amount of the recovery for buildings totally destroyed, to the effect that the jury shall not consider the evidence at all as to the value of the building, unless the buildings were destroyed because of criminal fault of the insured, is not misleading, where other instructions fully advised the jury that false swearing even as to the value of the buildings would defeat recovery under the policy.

Appeal from a judgment of the superior court for King county, Tallman, J., entered April 18, 1918, upon

[1]Reported in 182 Pac. 586.

the verdict of a jury rendered in favor of the plaintiffs, in an action on a fire insurance policy. Affirmed.

H. T. Granger, for appellant.

Geo. Olson, Jay C. Allen, and *W. R. Bell,* for respondents.

PARKER, J. — This action was commenced in the superior court for King county by the plaintiff, Dorothy Pierce, upon a fire insurance policy issued by the defendant insurance company to J. C. Lewis, providing for the payment to Mrs. Pierce and Lewis for the loss of the property as their respective interests may appear. The policy was so issued in recognition of the fact that Lewis held possession of the property under a contract of sale from Mrs. Pierce, she retaining title thereto to secure the payment of the balance due her from Lewis upon the purchase price. Lewis, being made a defendant in the action, filed a cross-complaint, setting up his claim of interest. While, by the pleadings, there seems to have been a slight disagreement between Mrs. Pierce and Lewis as to the amount of her interest represented by the balance due her upon the purchase price of the property, the controversy here has to do only with the question of the liability of the insurance company under the policy as such liability may be affected by the acts of Lewis at the time of the fire causing the loss, and his alleged failure to thereafter comply with the terms of the policy. Trial upon the merits in the superior court sitting with a jury resulted in verdict and judgment in favor of Mrs. Pierce and Lewis, awarding them recovery in the full amount of the policy, from which the insurance company has appealed to this court.

The policy here in question is one of two concurrent policies of $2,500 each. The property insured was a

frame store building and a frame warehouse building, used by Lewis in conducting a general store, which he also held under contract of sale from Mrs. Pierce, together with the buildings, situated in the town of Pacific City, in King county. Both buildings were entirely destroyed by fire on March 8, 1917, while these policies were in force. We are here concerned only with the affirmative defenses made by the insurance company that Lewis purposely caused the fire to occur with intent to defraud the insurance companies, that he made false statements under oath in making his proof of loss such as to prevent his recovery under the terms of the policy, and that he failed to submit to examination under oath touching the loss upon demand therefor, as provided by the terms of the policy, precluding recovery. Other facts will be noticed as they may become necessary in our discussion of the several contentions made by counsel.

It is contended by counsel for the insurance company that the trial court erred in refusing to take the case from the jury, in compliance with motions timely made in that behalf, and decide, as a matter of law, that there could be no recovery upon the policy. It is argued that the evidence relating to the alleged intentional causing of the fire by Lewis, and also the evidence relating to alleged false statements made by him under oath in the making of his proof of loss, was such as to call for the deciding of the case against the insured by the court as a matter of law. Our review of the evidence quite convinces us that these were questions of fact calling for decision by the jury, rather than by the court as matters of law. The evidence touching these questions was conflicting. We think this branch of the case does not call for further discussion.

It is further contended that the trial court should have taken the case from the jury and decided, as a matter of law, that there could be no recovery upon the policy, because Lewis failed to submit to examination under oath upon demand therefor, made by a representative of the insurance company under the following provisions of the policy:

"The insured, as often as required, shall . . . submit to examinations under oath by any person named by this company, and subscribe the same.

"No suit or action on this policy for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, . . ."

On May 23, 1917, a representative of the insurance company sent by mail to Lewis at Pacific City the following notice and demand:

"You are hereby notified to appear at 2:30 p. m. on Monday, the 28th inst., before S. H. Steele, a Notary Public, Room 1115 Alaska Building, Seattle, Washington, for examination under oath as provided for in the conditions of said policy."

This notice was received by Lewis at Pacific City on the following day. Prior to that time, investigation had been instituted and made by the public authorities, looking to the prosecution of Lewis criminally for causing the burning of the property with intent to defraud the insurance companies. We think the jury might well have believed from the evidence that this investigation was at the instance of a representative of this and other insurance companies. A few days after receiving the notice, Lewis learned that steps were being taken looking to his prosecution for causing the fire to defraud the insurance companies. During the forenoon of May 28, he went to Seattle, which is some twenty-five miles distant from

Pacific City, going direct to the office of the prosecuting attorney, intending to go to Mr. Steele's office in the afternoon at 2:30 in response to the notice for him to appear there at that time for examination. Soon after arriving at the prosecuting attorney's office, he was questioned at length touching the fire and the property, in the presence of a deputy prosecuting attorney and one Groce, the latter, as the jury might well believe, being a representative of this and other interested insurance companies. Groce made notes of what Lewis then said in answer to questions propounded to him. Immediately following this questioning of Lewis, a deputy sheriff was called into the office, and Lewis was arrested under a warrant which had been theretofore issued. We assume that the warrant was issued upon a charge of arson in connection with the fire, though the record before us is not specific as to the exact nature of the charge. He claims he was not able to procure his release upon bail for two or three days following his arrest, and hence was obliged to remain in jail and was prevented from going to Steele's office on the afternoon of May 28 for examination in compliance with the notice from the insurance company.

The place where Lewis was confined in jail was but a few blocks from Steele's office in Seattle; and we think the jury might well have believed from the evidence that the representative of the company who was to conduct the examination of Lewis in Steele's office knew at the time that Lewis was arrested and could be found at the jail. No effort was made to see Lewis and examine him there. No further demand was made upon Lewis by any one that he submit to examination. He was released from jail upon bail furnished a few days after his arrest, and he thereafter made no further effort to present himself at Steele's office for

examination. The trial court submitted to the jury the question of whether or not Lewis failed, without reasonable cause, to submit himself for examination, and the effect of the jury's verdict was that he did not so fail. We are of the opinion that, under the circumstances, it could not be decided, as a matter of law, that Lewis failed, without reasonable cause, to appear at Steele's office and submit to examination, as demanded by the insurance company, and that the trial court did not err to the prejudice of the insurance company in leaving that question for the jury to decide. This conclusion finds support in what may be regarded as the leading decision upon that subject, in *Phillips v. Protection Ins. Co.*, 14 Mo. 221. It is further argued in this connection that Lewis should have gone to Steele's office and offered to submit to examination after he was released from jail. But we are equally clear that it could not be so decided, as a matter of law, especially in view of the fact that the place of examination was some twenty-five miles from the place of the fire and Lewis' residence. The law touching Lewis' obligation to appear at some place other than Pacific City for examination is as stated in 14 R. C. L. 1342, as follows:

"The place where the loss occurs is the proper place for the examination, and neither the insurance company nor the insured has the right to demand that it shall take place elsewhere."

It is contended that the trial court erred to the prejudice of the insurance company in concluding one of its instructions to the jury in language as follows:

"So unless you find that the fire occurred or that the buildings were destroyed because of criminal fault on the part of the defendant Lewis, you should not consider the evidence at all as to the value of the buildings."

We have noticed that the buildings were totally destroyed by the fire. It follows, therefore, that the amount of the recovery under the policy, if any recovery could be had at all, would be the amount stated in the policy, as provided in § 6059-105½, Rem. Code, as follows:

"Whenever . . . the property insured shall be wholly destroyed, without criminal fault on the part of the insured, or his assigns, the amount of insurance written in such policy shall be taken conclusively to be the true value of the property when insured, and the true amount of the loss and measure of damages when destroyed. . . ."

It was in stating the law as embodied in this section, and the rights of the insured thereunder, in so far as the amount of their recovery alone was concerned, if they be awarded recovery, that the court used the above quoted language. The argument of counsel is that this quoted language of the instruction in effect advised the jury not to consider the evidence of the value of the buildings as bearing upon the question of Lewis having sworn falsely in his proof of loss touching the value of the buildings. It seems to us the question of the value of the buildings was only incidental to the question of willful over-insurance on the part of Lewis, which in turn was only incidental to the question of his having purposely caused the fire with intent to defraud the insurance company. Reading the above quoted language of the instruction complained of without reference to the whole of that instruction, of which it was a part, and without reference to the other instructions, it may be subject to some criticism, but the whole of that particular instruction related alone to the amount the insured were entitled to recover, if any recovery was to be awarded them; and there were other instructions fully and plainly

advising the jury that false swearing on the part of Lewis in his proof of loss, even as to the value of the buildings, would defeat recovery under the policy. Viewing the instructions as a whole, we think the jury was not misled to the prejudice of the insurance company by the court's language above quoted.

Other claims of error, we think, are so plainly without merit as not to require further discussion.

The judgment is affirmed.

HOLCOMB, C. J., MOUNT, and FULLERTON, JJ., concur.

[No. 15028. Department Two. July 8, 1919.]

MARION COLDEEN, *Respondent*, v. GEORGE L. REID, *as Sheriff of Spokane County, et al., Appellants.*[1]

SHERIFFS AND CONSTABLES (36)—WRONGFUL KILLING—ACTION ON BOND—EVIDENCE—SUFFICIENCY. In an action on a sheriff's official bond for the wrongful death of a person shot by a deputy sheriff in attempting to make an arrest, evidence warranting a finding that deceased met his death from a shot from the deputy's revolver under circumstances affording no justification, makes a question for the jury, notwithstanding that it was directly opposed by defendant's evidence.

SAME (36)—WRONGFUL DEATH—EVIDENCE—ADMISSIBILITY. In an action on a sheriff's official bond for the wrongful death of a person shot by a deputy sheriff in attempting to make an arrest, defendants are entitled to show the officer's belief that deceased was committing a felony, where there were sufficient facts to make it a question for the jury whether or not the officer had reasonable ground to believe that the deceased was in the act of committing a felony.

ARREST (6)—AUTHORITY—FORCE—MISDEMEANOR. In attempting to make an arrest for a misdemeanor, police officers have no warrant to maim or kill a person who attempts to escape.

APPEAL (140)—EXCEPTIONS—EXCLUSION OF EVIDENCE. Under Rem. Code, § 385, no formal exception is necessary to the ruling of the court rejecting evidence.

SAME (142)—EXCEPTIONS—TO INSTRUCTIONS. No exception to the refusal to give an instruction is necessary to preserve an objection

[1]Reported in 182 Pac. 599.

to the exclusion of evidence after objections and ruling made at the trial.

SAME (142). After error in refusing to give a requested instruction, exceptions to the instructions given are not necessary to preserve the question.

NEW TRIAL (34)—GROUNDS—NEWLY DISCOVERED EVIDENCE. Where plaintiff's evidence was self-contradictory, and there was serious room for doubt, a new trial should be granted, upon disclosing supporting evidence which could not, with reasonable diligence, have been discovered before the trial.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered January 21, 1918, upon the verdict of a jury rendered in favor of the plaintiff, in an action for wrongful death. Reversed.

John B. White, Joseph B. Lindsley, and *Fred J. Cunningham,* for appellants Reid *et al.*

Merritt, Lantry & Merritt, for appellant National Surety Company.

Roy A. Redfield, for respondent.

FULLERTON, J. — The respondent, as the widow of one Harvey Coldeen, brought this action against the appellants, Reid, Bradley and the National Surety Company, respectively, sheriff of Spokane county, deputy sheriff of that county, and surety on the sheriff's official bond, to recover in damages for the alleged wrongful killing of Coldeen by the deputy Bradley. There was a recovery in the court below, and the appeal is from the judgment entered.

The evidence as to the facts surrounding the transaction is strangely in conflict. According to the testimony of a young man who was with Coldeen at the time he was found dead, he met Coldeen at a pool hall, in the city of Spokane, at about half past eleven o'clock on the evening of the day before Coldeen met his death. They played pool at this place until about mid-

night, when they went to a restaurant for lunch. They stayed in the restaurant for some time, finding, on reading the time sheet, that the last street car for the night, going in the direction of Coldeen's home, had gone. Coldeen then suggested that they go down the street and find an automobile in which the witness could drive him home. They started on this quest, finding and examining several which they could not operate because of the precautions the owners had taken against possible theft, finally finding one they could operate standing in front of a garage. This car they got into, and started in the direction of Coldeen's home. On the way, at whose suggestion the witness does not remember, they changed their course, concluding to go to a dance held that night at a place called Colbert, some miles distant from and north of Spokane. On the way to Colbert they drove rapidly, overtaking and passing a car containing four persons. Shortly after passing the car, it came up alongside of them, when one of its occupants flashed a flashlight over them. Thinking this a challenge for a race, and at the suggestion of Coldeen to speed up as they could outrun the other car, he speeded up and was pulling away from the other car, when a shot was fired by one of its occupants. He then slowed down the speed of the car, when the other car passed him and likewise slowed down. He then again increased his speed and was again passing the other car, when another shot, or perhaps two in rapid succession, he was uncertain which, were fired by the occupants of the car. He then slowed down, turning his car into a bank on the side of the road, when he was arrested by the occupants of the other car, who proved to be deputy sheriffs. He then, for the first time, discovered that Coldeen was dead. He did not hear Coldeen speak after the first shot was fired. When the car stopped

against the bank, he says Coldeen was sitting almost upright in the car, with his head leaning to one side, with fresh blood oozing from his mouth and nostrils and from a wound on the back of his head.

The story of the officers is that they were likewise on the way to Colbert, having been directed to go there by the sheriff because of information of lawless conduct by some of the attendants at a dance held at that place. When the car driven by the former witness overtook them, it was proceeding at a very rapid rate of speed; that, as it approached, they noticed there was no license plate on its front, and when it passed them, they noticed there was none on its rear; that the deputy Bradley then directed the driver of their car to overtake them; that the driver did so, and as their car came alongside of the other, Bradley stood out on the running board, exhibited his badge as a deputy sheriff, flashed his flashlight in front of the occupants of the car and shouted "halt"; that the car, instead of stopping, increased its speed, and as the rear wheel came opposite him he fired into the tire of the wheel; that the car then slacked up, their car passing it and also slowing up and pulling in towards the center of the road; that the other car then again speeded up and passed them on the left, when Bradley again fired at the other rear tire, firing over the hood of the motor of the car in which he was riding; that the car then slowed up and turned toward a by-road leading away from the main highway, but missing it, ran against a bank on the side of the road, where it stopped. The officers then discovered that Coldeen was dead, and placed the other party under arrest. Seemingly, they then made no particular examination of the body of Coldeen. They say the lower part of his face was covered with coagulated blood, and that the wound on the back of his head had the appearance

of having been made with a blunt instrument. The body was covered with a blanket or robe and left in the car while the sheriff was called to the place by telephone.

The sheriff, the coroner and an undertaker arrived at the place soon after. It was then discovered that Coldeen died from a bullet wound; that the bullet entered his head a little to the left of the median line at the junction of the occipital and parietal bones, passed through the brain substance in a slightly upward course and lodged on the frontal bone of the head, fracturing it both perpendicularly and transversely. The body of Coldeen was found in a sitting posture, substantially as described by the driver of the automobile. It was removed from the car and, as they testify, a minute and careful examination made of the car by the sheriff, four of his deputies who were present, and by the coroner. Each of them testify that it bore no marks of bullets discoverable, save in the tires of the rear wheels, both of which were then deflated and showed punctures such as would be made by firing into them with a revolver. The rear tires were taken from the wheels at the direction of the sheriff and carried away by him. The car was then removed to a by-road and left standing for a few hours, when it was removed to a garage at Hilliard by the direction of the sheriff.

The sheriff also testifies that, after hearing the statements of his deputies as to the number of shots that had been fired by them, he examined the revolvers carried by them, and found that none of them had been fired except Bradley's, and that there were two empty shells only in the revolver carried by him.

The bullet taken from Coldeen's head was much distorted and battered, and weighed twenty-two grains less than the manufacturer's statement of the weights

of the bullets used by Bradley, and twenty-two grains less than one taken from Bradley's gun after the shooting.

The principal conflict in the testimony is over the condition of the car at the time it was examined by the coroner and the sheriff and his deputies. The back curtain of the car was introduced in evidence. It contains two holes, such as could have been made by bullets. Both are below the isinglass window of the curtain, one some three and one-half inches and the other seven inches to the left of the center of the curtain. The holes are four and one-half inches apart, and, when measured from the bottom of the curtain, one is three inches higher than the other, the one farthest from the center being the higher. The lower one is possibly two inches above the back of the cushioned seat of the automobile, and the other, of course, some five inches above it. They are plainly visible, even at a casual glance, at a point several feet distant. Photographs taken of the car some days after the shooting show them plainly. Four witnesses testtifying for the respondent say they saw the holes in the curtain while the car was standing at the place where it was left by the sheriff immediately after the shooting, and four others testify that they saw them in the afternoon of the same day, after the car had been removed to the Hilliard garage at the direction of the sheriff. We have called attention to the evidence of the coroner, the sheriff and his deputies as to the condition of the car at the time they left it, after taking Coldeen's body from it and removing the rear tires. While on the witness stand they emphatically testified that the holes were not in the curtain at that time. The sheriff further testified that the first time he learned of the holes in the curtain was

after the coroner's inquest on the body of Coldeen, some days after the shooting. He says that a rumor reached him to that effect and that he went to the Hilliard garage to examine the car; that the holes then appeared as they now appear, and no one could overlook them.

The respondent offered the testimony, also, of parties living in the vicinity of the highway near where the shooting occurred. Three of these testify that they heard the racing cars and the shots from the revolver. They testify that there were three shots, following each other in reasonably rapid succession, such, the record recites, as one—two—three. One of them, however, testifies positively that the racing cars were going south, in the opposite direction from the direction these cars were actually traveling. Another, while not so positive, thought they were going south. Still another testifies to but two shots, both fired in rapid succession and at the time of the first meeting of the cars on the highway. The person whose telephone was used by Bradley testified that Bradley, while telephoning to the sheriff immediately after the shooting, made a statement indicating that he had killed one of the occupants of the car. This witness was one of the four witnesses who examined the curtain of the car before it was removed to Hilliard and who testified that it then bore the marks of the bullets. His statement concerning what Bradley said in the telephone conversation is denied by the sheriff.

At the conclusion of the plaintiff's case, the defendants interposed a challenge to the sufficiency of the evidence. The challenge was overruled, whereupon the defendants introduced evidence on their own behalf. At the conclusion of all of the evidence, the challenge was renewed, and after the return of the verdict, a motion for judgment notwithstanding the

verdict was made. The challenge and motion being overruled, the defendants moved for a new trial on all of the statutory grounds, supporting their motion by affidavits.

The first contention of the appellants is that the evidence is insufficient to justify the verdict. This question, we think, requires no extended discussion. If the jury believed the evidence of the respondent's witnesses, they were warranted in finding that the deceased met his death from a shot from the deputy sheriff's revolver, under circumstances which afforded no legal justification. The jury could have found that the deceased and the person with him in the automobile were committing a misdemeanor only, and that the deputy deliberately fired at them because they refused to stop at his command. It is true that the evidence from which such a conclusion is reached is not entirely consistent with other evidence introduced by the respondent and is directly opposed by the testimony of the sheriff, his deputies, the coroner, and the supporting witnesses of the sheriff; and it is true, also, that such a conclusion cannot be reached without the finding that the sheriff, his deputies and the coroner committed deliberate and willful perjury; but the question was one for the jury nevertheless, and one upon which their findings are conclusive upon the court. It is perhaps unnecessary to add that police officers, in making an arrest, have no warrant to act oppressively, or to wantonly injure the person they attempt to arrest, or to maim or kill a person who attempts to escape from arrest, when the offense committed is a mere misdemeanor.

The second contention of the appellants is that the court erred in the exclusion of evidence. On the trial of the case the deputy sheriff, in answer to questions put to him by the appellants' counsel, was proceeding

to state his belief as to the character of the offense the deceased and his companion had committed, stating that their conduct had led him to believe that the car had been stolen. On objection, the trial court withdrew the statement from the consideration of the jury, and refused the offer of further evidence to the same effect. In its instructions, also, the court charged the jury on the theory that the offense committed by the deceased and his companion was a misdemeanor only, charging in effect that the deputy was not justified in shooting at the occupants of the automobile, "whether they understood or did not understand that Bradley was an officer, or even if they were attempting to escape from arrest," and refusing a request to charge on the theory that the offense committed was a felony.

In rejecting the proffered testimony and in refusing to charge as requested, we think the court was in error. In this state, where the common law rule prevails, a police officer is justified in making an arrest when he has reasonable ground to believe, and does believe, that a crime is being committed, and, having the right to make the arrest, he has the right to use that degree of force the circumstances of the case warrant; that is to say, if the crime is a misdemeanor, he may use the force the law permits in making arrests for misdemeanors; and if it be a felony, he may use the force the law permits in making arrests for felony. When, therefore, an officer is called upon to answer for a claimed unlawful arrest, or for excessive use of force in making a lawful arrest, he has the right to show the circumstances surrounding the transaction, and the impression these circumstances make on his mind, and to have the jury charged on his theory of the case; unless, of course, the circumstances were such that there could be no two opinions concerning it. Here there was sufficient facts to make it a question

for the jury whether or not the officer had reasonable ground to believe the deceased and his companion were in the act of committing a felony, and, in consequence, was entitled to show what impression these facts made upon his mind. It was error, therefore, to exclude the proffered testimony.

We are met, however, with the contention that the appellants have not properly preserved the objection in the record, since no exception was taken either to the court's ruling rejecting the evidence, or to his refusal to charge as requested. But no formal exception is necessary to the ruling of the court rejecting the evidence (Rem. Code, § 385), and no exception to the refusal to give an instruction upon the question was necessary to preserve the objection. *Nelson v. Western Steam Nav. Co.*, 52 Wash. 177, 100 Pac. 325. Nor was an exception to the instruction actually given necessary for that purpose. These are unobjectionable upon the court's theory of the case, and after the opposing party had met with one rejection of his own theory, it was not necessary in order to preserve the question to pursue the matter throughout the trial.

We think further that the court might well have granted a new trial on the ground of newly discovered evidence. After the trial, the appellants were able to gather some new evidence directly supporting their theory of the case, and much that supported it inferentially. The trial court seems to have denied the motion because the directly supporting evidence was cumulative, and because the other was in a large measure overcome by the counter affidavits filed. But while the rule applied is appropriate in an ordinary case, this case, we think, presents questions unusual in cases of its character. As we have attempted to show, the evidence introduced by the prevailing party is in a manner self-contradictory and cannot all be true, not

in the sense that perjury was committed by the witnesses, but because they were not in a position to observe or hear accurately, and could receive wrong impressions. But no such condition confronts the officers of the law. With them there is no room for mistake. They either told the truth or they committed deliberate and willful perjury. The finding of the jury that the latter was the fact is more serious to them than is the money element involved, and where there is such serious room for doubt and supporting evidence is discovered which could not, with reasonable diligence, be discovered before the trial, we think it but just that a new trial be granted.

The judgment is reversed and a new trial awarded.

MAIN, MOUNT, and PARKER, JJ., concur.

HOLCOMB, C. J., concurs in the result.

[No. 15240. Department Two. July 8, 1919.]

NETTIE O. ROWE, *Respondent*, v. JACKSON SILBAUGH *et al.*, *Appellants*.[1]

JUDGMENT (38, 137-1)—SETTING ASIDE—INVALID SERVICE. A judgment of default upon publication of summons and attaching land as the property of a nonresident is properly set aside for fraud, where it appears that plaintiff commenced suit by mailing summons to defendant's former address, after being informed that she had left there and was probably on the land, without any attempt to make personal service, when any diligence would have disclosed that she was residing on the land from the commencement of the action until entry of judgment, and she had a valid defense and no notice of the suit.

Appeal from a judgment of the superior court for King county, Frater, J., entered July 1, 1918, upon findings in favor of the plaintiff, in an action for equitable relief, tried to the court. Affirmed.

[1]Reported in 182 Pac. 576.

Fred M. Bond and *Jackson Silbaugh,* for appellants.
R. G. Chambers, for respondent.

PARKER, J.—This is a suit in equity, commenced in the superior court for King county, wherein the plaintiff, Mrs. Rowe, seeks the setting aside of a judgment rendered against her by default in that court in favor of the defendant Mr. Silbaugh, and also the cancellation of a sheriff's deed purporting to convey to Mrs. Silbaugh a tract of land belonging to Mrs. Rowe in the town of Long Beach, in Pacific county, in this state, in pursuance of a sale thereof made under an execution issued upon that judgment. A trial upon the merits resulted in judgment in the superior court setting aside the judgment and cancelling the sheriff's deed as prayed for, and permitting Mrs. Rowe to appear and defend in the action in which that judgment was rendered. From this disposition of the cause, the defendants have appealed to this court.

The ground upon which the relief prayed for by Mrs. Rowe and granted by the court was rested was fraud in procuring the judgment sought to be set aside. The facts touching this question may be summarized from the record before us, as follows: We first note that all that was done by both Mr. and Mrs. Silbaugh in procuring the judgment sought to be set aside and in the taking of title to Mrs. Rowe's land under the sheriff's deed was manifestly done for and in behalf of the community composed of Mr. and Mrs. Silbaugh. In February, 1914, Silbaugh and Mrs. Rowe entered into a contract in writing for an exchange of real property. This contract was executory, providing for the doing of several things by the respective parties looking to a consummation of the exchange. It contained, among other provisions in the body thereof, a stipulation that, "In case of the failure of either party

to make the exchange of titles in accordance with the above agreement, unless due to a failure of title beyond the power of such party to remedy, the party in default shall forfeit as liquidated damages the sum of $500." Shortly after the signing of the contract, Silbaugh and Mrs. Rowe modified this forfeiture clause of the contract by indorsement upon the paper upon which the contract was written, following their signatures thereon, which indorsement was signed by both Silbaugh and Mrs. Rowe. In July, 1914, the exchange of the properties not having been consummated, Silbaugh commenced an action in the superior court for King county, seeking recovery of damages from Mrs. Rowe, rested upon her alleged failure, without excuse, to comply with the terms of the exchange contract, and claiming $500 liquidated damages, as stipulated in the body of the contract. Assuming that Mrs. Rowe could not be served personally in this state, Silbaugh, on July 25, 1914, commenced his action by the filing of a complaint, at the same time filing his affidavit for the issuance of a writ of attachment, stating the purpose of the action, and that Mrs. Rowe "is a nonresident of the state of Washington." A writ of attachment was thereupon issued, and on August 7, 1914, was levied upon Mrs. Rowe's land here involved. On August 6, 1914, Silbaugh filed his affidavit for the publication of a summons, stating that "the defendant is a nonresident of the state of Washington and cannot be found therein, although diligent search has been made;" and that on that day he had duly mailed a copy of the summons and complaint in the action, addressed to her at 137 Short street, Edmonton, Alberta, he believing that to be her then postoffice address. The summons was first published on August 15, 1914, in a Seattle paper, and directed the defendant to appear within sixty days after that date.

On October 22, 1914, Mrs. Rowe having failed to appear in the action, and the service of summons by publication and the issuance and levy of the writ of attachment upon her land being shown to the court, as above noticed, judgment was rendered by the court against her, upon motion of counsel for Silbaugh, for the full amount claimed, to wit, $500 as liquidated damages. No summons was ever placed in the hands of any officer or person with a view of serving the same upon Mrs. Rowe personally. Mrs. Rowe had been at Edmonton for some time prior to about the middle of June, 1914, which fact was known to Silbaugh, but she left there about that time, coming to Seattle, where she stopped a day or two and called upon Judge Salisbury, who had been for several years, and was then, her legal adviser. She then went to Portland to see her husband, who was employed there, and a few days later went to Long Beach to look after her property which is here involved. After staying at Long Beach a few days, she went back to Portland to get some things to take to her place at Long Beach, with a view of spending the summer there, arriving again at Long Beach not later than August 3, 1914. She then remained at Long Beach upon the land continuously until some time in October of that year. This period of her stay upon the land, it will be noticed, commenced before the date of the making of the affidavit for publication by Silbaugh and the publication of the summons, and continued until about the time of the rendering of the judgment against her on October 22, 1914. Silbaugh was well acquainted with Judge Salisbury, Mrs. Rowe's attorney, and we think it plain from the evidence had, a short time before commencing the action, learned from him that Mrs. Rowe was not then at Edmonton, but had been to Seattle and had gone to Portland on her way to Long Beach. Mrs. Rowe first

discovered in January, 1916, that she had been sued by Silbaugh, that a judgment had been rendered against her by default, and that her land had been sold under an execution issued upon such judgment. While the evidence is not entirely free from conflict, we are quite convinced, as the trial court evidently was, that the facts as above summarized are fully established by the evidence.

These facts, we think, show that Silbaugh did not exercise that degree of diligence in seeking personal service upon Mrs. Rowe within this state which the law demands in such cases, though it may be conceded that Silbaugh, at the time of making and filing his affidavit, on August 6th, for publication of summons, then honestly believed Mrs. Rowe was a nonresident of the state. Mrs. Rowe's actual presence upon the very land at Long Beach sought by Silbaugh to be subjected by the action to the payment of his claim, continuously from prior to the making of his affidavit for publication until about the time of rendering judgment; Silbaugh's knowledge that she was not at Edmonton when he commenced his action and mailed the summons to her there; his information that she was then probably at Portland or at Long Beach; his entire failure to attempt personal service of summons upon her at Long Beach or elsewhere; and her entire ignorance of the pendency of the action until long after judgment was rendered against her, it seems to us argues all but conclusively in support of the relief prayed for by her and granted by the trial court, if she has shown that she has a valid meritorious defense to the claim of Silbaugh upon which the judgment by default was rendered against her. And this we think she has clearly shown, as held by the trial court. We think the case does not call for further discussion. The case of *Rowe*

v. Silbaugh, 96 Wash. 138, 164 Pac. 923, L. R. A. 1918D 466, is of interest as a part of the history of this controversy.

The judgment is affirmed.

HOLCOMB, C. J., and MOUNT, J., concur.

[No. 15325. Department One. July 8, 1919.]

HANNA ENGSTROM, *Administratrix of the Estate of Ingeborg Turnquist, Respondent*, v. CHARLEY E. PETERSON, *Appellant*.[1]

WITNESSES (45)—COMPETENCY—TRANSACTIONS WITH PERSON SINCE DECEASED. Rem. Code, § 1211, forbidding testimony as to any transaction had with a person since deceased, does not exclude evidence as to whether a deed contained an interlineation of the deceased's name as grantee at the time it was executed, the deceased not having been present at the time of the transaction.

ALTERATION OF INSTRUMENTS (6, 12)—DEEDS—TIME OF ALTERATION—EVIDENCE—EFFECT ON TITLE OF GRANTEE. The presumption that an interlineation in a deed was made before execution is overcome by the positive testimony of one of the grantors that it was made afterwards, together with the appearance of the deed itself, so indicating.

SAME (8)—CONSENT OF PARTIES. After delivery of a deed, an alteration, inserting the name of an additional grantee, has no effect upon the grantee's title, even though it be with consent of the parties, in the absence of evidence that the deed was redelivered.

ESTOPPEL (20-23)—PREJUDICE TO PERSON SETTING UP ESTOPPEL. The grantee in a deed, which was recorded with an interlineation naming a woman as his wife as an additional grantee, is not estopped to assert sole title by the fact that he lived on the premises with the woman as his wife, and permitted her to occupy and use it as a home during his absence; nor by the fact that the two joined as husband and wife in a mortgage upon the premises to secure part of the purchase price; as it does not appear that she was misled to her prejudice.

[1]Reported in 182 Pac. 623.

HUSBAND AND WIFE (47)—COMMUNITY PROPERTY—EXISTENCE OF COMMUNITY. Property acquired by a man and woman not married, but living together as husband and wife, is not community property, and, in the absence of any trust relation, belongs to the one in whose name the legal title stands.

Appeal from a judgment of the superior court for King county, Smith, J., entered December 17, 1918, upon findings in favor of the plaintiff, in an action for partition, tried to the court. Reversed.

H. B. Madison and *Tucker & Hyland (S. H. Steele,* of counsel), for appellant.

Elias A. Wright, Sam A. Wright, and *Ralph Woods,* for respondent.

TOLMAN, J.—Respondent, as administratrix of the estate of Ingeborg Turnquist, deceased, instituted this action for the purpose of establishing that her decedent, in her lifetime, acquired title to an undivided half interest in a certain ten-acre tract of land in King county; that she was a tenant in common with appellant, the owner of the other undivided half interest, up to the time of her death, and prayed that the lands be partitioned. From a judgment establishing such title and tenancy and directing that partition be made, appellant brings the case here on appeal.

It appears that Ingeborg Turnquist, prior to the year 1901, lived in Tacoma in a small two or three room house owned by her, but standing on leased ground, and supported herself by going out by the day in the performance of domestic services. While so situated she met appellant, who was a sailor by occupation, employed on boats plying between Puget Sound points and San Francisco. About the year 1901, these persons began living together, and held themselves out as husband and wife, though in fact they were never married. With the exception of a

time when both were employed at Walla Walla, they continued to so live together in Tacoma, each continuing his or her gainful occupation as theretofore, appellant, of course, being absent for longer or shorter periods as his calling demanded. In 1908, appellant abandoned seafaring, the woman sold her home, for what amount does not appear, and they removed to King county near Kent, where they occupied rooms in a house belonging to, and occupied as a home by, one John Lybeck and his wife. On May 15, 1908, appellant purchased ten acres of land from the Lybecks for which he agreed to pay $600, and on that day he received a written receipt from John Lybeck for $200 paid in cash as a part of the purchase price; appellant testifying that this money was a part of his individual savings accumulated while employed at Walla Walla. After making the purchase, appellant went to Alaska, where he appears to have found employment for the summer, leaving the woman known as his wife still occupying the rooms in the Lybeck home. He returned in the fall, spent the winter there with her, and again went to Alaska for the summer of 1909. In November, 1909, having come back from Alaska with, as he says, some $900 as the fruits of his season's work, he went to the office of an attorney or notary in Kent with Mr. and Mrs. Lybeck, where a warranty deed was prepared and duly executed by Mr. and Mrs. Lybeck, conveying the ten acres of land theretofore purchased. The deed, which is in evidence, is upon a printed blank, generally known as the statutory form, and the blanks are filled by the insertion of the names of the Lybecks as grantors and the name of appellant as grantee, a description of the land, and the date, all completed in typewritten form.

As the deed now appears, after the name "Charley E. Peterson," typewritten, there appears, written with

a pen and in a hand totally dissimilar to the signatures of either of the grantors, the words, "and Ingeborg Peterson, his wife." Mr. Lybeck has since died, but his wife and brother were produced as witnesses upon the trial. The former testified that she, her husband, and appellant went to Kent on the day the deed bears date; that the deed, as there prepared and executed, was without the interlineation "and Ingeborg Peterson, his wife"; that the deed was delivered to appellant as executed; that they all returned home together and the deed was there shown to the woman she knew as Mrs. Peterson, who had remained at home while the deed was being executed in Kent, and who, upon the deed being exhibited to her, became angry because her name was not in it as a grantee; that Mr. Lybeck then explained to her that, as she was appellant's wife, the property became community property belonging to both without her name being written into the deed, and that, upon the death of either, the title would vest in the survivor; but according to Mrs. Lybeck, deceased declared that she would see that her name went into the deed.

Mrs. Lybeck further testified that appellant and his supposed wife took the deed with them to the part of the house which they occupied, and that later it was returned by one of them to Mr. Lybeck for the purpose of having it recorded, and that he did record it. And she further testifies that the interlined name was not in the deed when it was returned from the auditor's office, though in this she was manifestly in error, as the auditor's record shows the grantees to be "Charley E. Peterson and Ingeborg Peterson, his wife." The brother also testified that he saw the deed after its execution and delivery, though he was unable to fix the date definitely, and that the interlined name was not in the deed when he examined it. Appellant, a

witness in his own behalf, was asked: "At the time this deed was executed, were those words 'and Ingeborg Peterson, his wife,' written in there?" To which an objection was interposed, based upon the statute, Rem. Code, § 1211, which limits the testimony of a party in interest, where the adverse party sues or defends as executor or administrator. This statute has been considered in many cases, and frequently quoted; but it may not be out of place to again say that the testimony forbidden is "as to any transaction had by him with or any statement made to him by any such deceased or insane person." We do not think any of our decisions go to the extent claimed by respondent, or that the language of the statute will bear a construction in harmony with the ruling of the learned trial court in sustaining this objection. The undisputed testimony is that respondent's decedent was not present at the time the deed was executed; and if living she could not have testified from her own knowledge as to the condition of the deed at that time. The transaction of executing the deed was not had with her. Under the rule laid down in *Kauffman v. Baillie,* 46 Wash. 248, 89 Pac. 548, we think appellant should have been permitted to answer.

Notwithstanding the absence of appellant's testimony as to the condition of the deed when executed, we think there is enough in the record to finally determine this case. It is true that we have held that an alteration in a written instrument, in the absence of any explanation, may be presumed to have been made before the execution and delivery. *Wolferman v. Bell,* 6 Wash. 84, 32 Pac. 1017, 36 Am. St. 126; *Baylis v. Kerrick,* 64 Wash. 410, 116 Pac. 1082. But such presumption is, of course, rebuttable and must fall as soon as competent evidence to the contrary is produced. Here we have the direct and positive testi-

mony of one of the grantors to the effect that the interlined name was not in the deed when it was executed and delivered; and however mistaken she may be as to the name not being there at a later time, after the instrument was recorded, yet her testimony, corroborated to some extent, as it is by the testimony of her husband's brother, together with the appearance of the deed itself, which is before us, convinces us that the deed was altered after its execution. There is no evidence to support the theory that the deed was so altered by the grantors or either of them, or if so altered, that it was redelivered. And in the light of the testimony as to the words and actions of the deceased, it can only be held that the deed was altered by her, or by her procurement. Whether that be so or not, the overwhelming weight of authority is to the effect that no alteration of a deed after it has once been delivered will have any effect upon the grantee's title. *Abbott v. Abbott,* 189 Ill. 488, 59 N. E. 958, 82 Am. St. 470; *Clark v. Creswell,* 112 Md. 339, 76 Atl. 579; *John v. Hatfield,* 84 Ind. 75; *Waldron v. Waller,* 65 W. Va. 605, 64 S. E. 964, 32 L. R. A. (N. S.) 284. In the latter case is an extensive note and many authorities are cited. This is the rule, even though the alterations be made with the consent of the parties. Such being the law, at the moment the deed to appellant was executed in the office of the notary, as testified to by Mrs. Lybeck, and delivered to him, the title vested in appellant, and could not be thereafter divested, except by operation of law or some act of his which the law will recognize as his deed, or as estopping him to deny title in another. We have only to inquire whether there is any estoppel.

Evidence was introduced to show that appellant, at about the time the deed was executed, built a house

on the land with the money which he brought back from Alaska, and thereafter he and his supposed wife occupied the same as their home; the woman, during the frequent absences of appellant in Alaska or elsewhere, as he might find employment, raising a garden and chickens by her own effort; and on one occasion a brother and his eleven-year-old son did some clearing of the land for her, but charged her nothing for their work. It is also argued that she must have received money from the sale of her house in Tacoma, and must have put the money so received into the purchase of this land or its improvement. But there is not a syllable of testimony in the entire record to the effect that she ever received any such money, or if she did, what disposition she made of it. It also appears that a portion of the purchase price of the land was never paid, and that in 1912, to secure this unpaid balance of the purchase price, and also a sum of money then borrowed, a note, secured by a mortgage upon the land for $500, was executed by appellant and the deceased, in the latter of which they were described as Charley E. Peterson and Ingeborg Peterson, his wife; and these instruments so executed were delivered to Lybeck. In view of the well known custom of money loaners and those who accept mortgages to require both husband and wife to join in the execution of a mortgage, though it may pledge only the separate property of one, and in view of the situation of these parties and the fact that they at all times concealed the illicit nature of their relations, we see nothing which can be held to establish an estoppel.

"The doctrine of estoppel should not be held to create title to land unless strong equitable reasons exist in support of it." *Murray v. Briggs,* 29 Wash. 245, 69 Pac. 765.

"It is well settled that the representation of the party to be estopped must have been really acted upon, otherwise no estoppel arises." *Bisbee v. Carey,* 17 Wash. 224, 49 Pac. 220.

"The estoppel, if any, operates only in favor of those who have been misled to their injury, and they alone can set it up." *Smith v. King County,* 80 Wash. 273, 141 Pac. 695.

After a careful consideration of all of the testimony in the case, we find nothing which will remove the title to the property involved from the operation of the rule laid down in *Stans v. Baitey,* 9 Wash. 115, 37 Pac. 316, and *In re Sloan's Estate,* 50 Wash. 86, 96 Pac. 684, 17 L. R. A. (N. S.) 960, to the effect that property acquired by a man and woman not married, but living together as husband and wife, is not community property, and, in the absence of some trust relation, the land must be regarded as belonging to the one in whose name the legal title stands.

For the reasons given, the judgment of the trial court is reversed, and the cause remanded with directions to dismiss the action.

MITCHELL, MAIN, and MACKINTOSH, JJ., concur.

HOLCOMB, C. J., took no part.

[No. 15158. Department One. July 9, 1919.]

GRACE M. BERRY, *Respondent*, v. NATIONAL COUNCIL OF THE KNIGHTS & LADIES OF SECURITY, *Appellant*.[1]

APPEAL (341)—BRIEFS—DESIGNATION OF APPELLANT. Appellant's brief will not be stricken or judgment affirmed on account of a misnomer of appellant corporation, where it appears to be identical with the name contained in and signed to the contract in suit.

INSURANCE (205)—MUTUAL BENEFIT INSURANCE—REINSTATEMENT—WAIVER OF OBJECTIONS. The fact that the holder of a beneficiary certificate had, while in good health, been reinstated for past lapses in payment of dues does not waive a default in payment as to which he could not be reinstated "under and by virtue of the by-laws" because he was not in good health, as required, at the time he attempted to be reinstated.

SAME (205). A beneficiary association does not ratify the act of a local secretary in reinstating a delinquent member and remitting the payments, where the society had no notice at the time of the payment that the beneficiary was not in good health at the time of the attempted reinstatement, and the payment was returned by the home office within a reasonable time.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered May 11, 1918, in favor of the plaintiff, in an action upon a beneficiary certificate, tried to the court. Reversed.

Thos. H. Bain, for appellant.

T. W. Hammond, for respondent.

MITCHELL, J.—The defendant is a foreign corporation, organized and doing business as a fraternal beneficiary society. It has a lodge system and representative form of government. Its members are united in subordinate councils under the jurisdiction and control of a national council. It has a local lodge in

[1]Reported in 182 Pac. 562.

Tacoma, in this state, known as "Abraham's Council No. 1137." George H. Berry became a member of the lodge at Tacoma, and thereupon, on March 30, 1915, defendant issued to him a beneficiary certificate in the sum of $500, payable to one to whose rights the plaintiff succeeds, upon the death of the insured, provided he had in the meantime paid all dues and assessments consisting of monthly dues of one dollar to the national council and twenty-five cents to the local lodge, complied with all the provisions of the constitution and laws of the order, and continued a member of the order in good standing. The insured died, due proof thereof was submitted to the defendant, and payment was demanded and refused. This action was instituted to recover on the policy. The trial by the court without a jury resulted in a judgment in favor of the plaintiff, from which defendant has appealed.

Respondent moves to strike appellant's brief and thereupon affirm the judgment for the reason that in all the pleadings and proceedings, including the judgment, in the trial court, the appellant was named "The Knights & Ladies of Security, a corporation," while in its brief in this court it is named "The National Council of the Knights & Ladies of Security, a corporation." It is noticeable, however, that in the second amended complaint, upon which the cause was tried, the policy is set out in full. It is therein designated "Beneficiary Certificate issued by The National Council of the Knights & Ladies of Security," and purports to have been signed in the name of "The National Council of the Knights & Ladies of Security," by its national president and secretary. Certainly respondent may not successfully object to the name used by appellant in its brief here, since it appears to

be identical with the one contained in and signed to the contract upon which the suit is based, whatever the name given it by her and in which response was made in the trial court. There is no merit in the motion and it is denied.

The beneficiary certificate, by its terms, makes the constitution and by-laws of the society a part of the contract of insurance. They provide that the certificate of a member who has not paid his assessment and dues on or before the last day of the month shall, by the fact of such nonpayment, stand suspended without notice and all rights under the certificate shall be forfeited; and no right under the certificate shall be restored until it has been reinstated by the member complying with the laws of the order with reference to reinstatement. On several occasions George H. Berry failed to pay his assessments and dues on or before the last day of the month, but on payment of the same later he was duly reinstated, under and by virtue of the by-laws as a member of the society, on each of the following dates, then being in good health, viz.: June 1, 1916, October 1, 1916, December 1, 1916, and January 1, 1917. It may be mentioned here that April 1, 1917, is given as another time on which he was reinstated; but obviously this is an error and is inconsistent with further detailed stipulated facts as follows:

"That said George H. Berry failed to pay his dues and assessments for the months of March and April, 1917, as they became payable, but on May 14, 1917, paid to the financier of his local lodge (an officer to whom all previous dues and assessments had been paid by him), the sum of $5 as and for assessments and dues to be paid by him for the months of March, April, May and June, 1917, and received from said local financier his receipt therefor in words and figures as follows, to wit:

"No..... KNIGHTS AND LADIES OF SECURITY $5
"Abraham's Council No. 1137
"Located at Tacoma, State of Washington.
"Received from George H. Berry, $5 payment for month of March, April, May and June, 1917.
"Chas. G. Mutchler, Financier.

"Whereupon said financier forwarded to the defendant at its home office in the State of Kansas $3, which sum was thereafter returned within a reasonable time to the plaintiff herein as shown by the letter of the National Secretary of defendant hereinafter set forth."

Thus it appears that, while the financier of the local lodge gave a receipt for $5 for four months, it is clear that only $3 of it was forwarded to the national council, for the months of March, April and May, in obedience to one of its by-laws to the effect that six months is the shortest period for which assessments and dues may be paid in advance. The remaining $2 evidently was applied on dues to the local council. On May 7, 1917, George H. Berry became ill in Detroit, Michigan, and was taken to a hospital in that city, where he remained until his death on May 31, 1917. Thereafter respondent presented her claim for the payment of the policy with proof of death of the insured, which was rejected by the national council of the society and notice given respondent by letter, already referred to, the body of which is as follows:

"In Re: Geo. H. Berry, B. C. No. 377234. Co. No. 1137.

"The claim on account of the death of your father was considered by our executive committee and unanimously rejected. The proof shows that he suspended himself by non-payment of March and April assessments and dues. There was an attempt to reinstate upon May 14th, but on account of the condition of his health at that time he could not reinstate. Under the circumstances he was not a member of the society at the time of his death.

"I am enclosing herewith the $3 in return for the assessments paid for the months of March, April and May. These are the assessments that were made at the time he attempted to reinstate when he was not in good health and not entitled to it."

Respondent, mindful of the settled rule in this state, found in *Kennedy v. Supreme Tent of the Knights of the Maccabees of the World,* 100 Wash. 36, 170 Pac. 371, that the by-laws of a fraternal society may be waived by a custom or line of conduct acquiesced in by the society, contends that appellant is denied the right to disavow the payment of May 14, 1917, as constituting a reinstatement, because of former lapses through nonpayment of dues and consequent suspension of the insured followed each time by a reinstatement. The argument fails to bear in mind that it is stipulated by the parties the reinstatement on former occasions took place "under and by virtue of the by-laws," which is not the case as to the nonpayment for the months of March and April, 1917. The constitution and by-laws of the society are to the effect that a member may be reinstated by payment within sixty days from the date of suspension of all arrearages, including assessments and dues for which he would have been liable had he remained in good standing, provided, however, that he be in good health at the time of making payment to the financier, with a view to reinstatement. In this respect it is further provided "the payment of any such assessment and dues for reinstatement shall be a warranty by such member that he is in good health at the time of such suspension." The proof shows the insured was in good health at the time of those reinstatements had "under and by virtue of the by-laws." But not so on May 14, 1917, when by payment to the financier of his local lodge the insured undertook to undo a suspension

because of delinquency in payment of assessments and dues for the months of March and April, without advising the society or any of its agents that at that time he was, and for a week had been, ill in a hospital—a sickness which continued until his death seventeen days later. To permit the payment made on May 14, 1917, to constitute a reinstatement of the insured, under the circumstances as they exist in this case, would sanction a violation of the positive provisions of the constitution and by-laws of the society to the effect that the insured should warrant that he was in good health at the time of the payment and application for a reinstatement.

Nor is this case controlled by the doctrine of *Schuster v. Knights & Ladies of Security*, 60 Wash. 42, 110 Pac. 680, 140 Am. St. 905, and other cases of the same kind. They declare the law to be that a beneficiary society ratifies the acceptance of dues, paid through the officer of a local lodge, and is estopped from claiming a member was not reinstated by payment within sixty days, where the society had notice at the time of payment that the member was not in good health, but nevertheless retained the payment for over a year after the death of the insured and made no offer or tender of repayment until some time after the suit was brought on the policy. In the present case, there is no proof that appellant or any of its agents, including the financier of the local lodge, knew the insured was in bad health on May 14, 1917; and the evidence does show that, after the money had been forwarded to the home office, appellant, "within a reasonable time," and before the bringing of this action, returned the money to respondent.

Finding that the provisions of the contract, through the constitution and by-laws of the society, making the existence of a state of good health under the warranty

of the member one of the terms and conditions for the reinstatement of a suspended member were, in this case, neither respected by the insured nor waived by the insurer, we conclude the judgment of the trial court is erroneous, and it is reversed with direction to dismiss the action.

MAIN, MACKINTOSH, and TOLMAN, JJ., concur.

HOLCOMB, C. J., took no part.

[No. 15187. Department One. July 9, 1919.]

L. S. DART *et al., Respondents,* v. MAUDE S. McDONALD, *Appellant,* D. K. McDONALD *et al., Defendants.*[1]

CONSPIRACY (7) — TO DEFRAUD — EVIDENCE — SUFFICIENCY. Under the rule that circumstances to establish a conspiracy to defraud must be inconsistent with a lawful purpose and that it is necessary to show that the person entered into an agreement with the other conspirators to accomplish the objects, a married woman's participation in the conspiracy of her husband and others, to defraud in obtaining subscriptions to valueless corporate stock, is not sufficiently established by evidence that, three or four years after the subscriptions were obtained, she did some business errands at the request of her husband relating to collections and was connected with a few subsequent transactions of like effect, and expressed an opinion that the subscribers would make considerable profit, it appearing that she took no part in the immediate transaction, and had only such knowledge as she derived from her husband.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered June 24, 1918, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for fraud. Reversed.

A. E. Gallagher and *Graves, Kizer & Graves,* for appellant.

F. W. Girand and *Fred M. Williams,* for respondents.

[1]Reported in 182 Pac. 628.

MAIN, J.—The purpose of this action was to recover damages alleged to have been caused by a fraudulent conspiracy by which the plaintiffs were induced to purchase stock in a certain corporation.

After the issues were framed, the cause came on for trial before the court and a jury, and resulted in a verdict against four of the defendants, two of whom were D. K. McDonald and Maude S. McDonald, his wife.

Mrs. McDonald moved for judgment notwithstanding the verdict and for a new trial, which motions were overruled. Thereupon judgment was entered upon the verdict. The judgment was against each of the defendants, including Mr. and Mrs. McDonald, but no judgment was entered against them as a community. From this judgment, Mrs. McDonald alone appeals.

It will only be necessary to state the facts and review the evidence as bearing upon the question of whether Mrs. McDonald was a party to the conspiracy by which the respondents were defrauded.

During the spring of the year 1913, D. K. McDonald conceived the project of obtaining a contract for the purchase of two tracts of land, containing about 1,378 acres, near Palo Alto, in the state of California, and subdividing, improving and selling the same. As a part of this plan, a corporation, under the name of the Spokane-Stanford Land Company, was organized under the laws of the state of Washington, with a capital stock of $280,000, its shares having a par value of $100. Subscriptions to its stock were obtained on the representation that it owned or would own the California land, and that a large profit would be made by the subdivision and sale of the same. The respondents subscribed for one hundred shares of this stock and agreed to pay par value therefor.

Certain other subscribers to the stock, who, according to the contract of subscription, were to pay par value for the stock subscribed by them, were, by private arrangement with McDonald, to acquire the stock for less than $100 per share, its par value.

At the time the corporation was organized, McDonald had acquired an option on the California land, and had the contract made in the name of D. K. McKinnon. According to the option contract, the purchase price was $392,500. Shortly after the corporation was organized, it took over the option contract, agreeing to pay for the land the sum of $517,500. George E. Snyder cooperated with McDonald in securing subscriptions to the capital stock of the corporation. The enterprise was a failure. The land has been lost by the corporation, and the investing stockholders have realized nothing upon their investment and the money so invested has been a total loss. The parties against whom recovery is sought in this action were the stockholders who had subscribed and agreed to pay par value for the stock, but were, by private arrangement with McDonald, to pay less, D. K. McKinnon, the holder of the option contract, George E. Snyder, the solicitor for the sale of the capital stock, and Mr. and Mrs. McDonald.

The theory of the complaint was that the parties against whom recovery was sought had entered into a conspiracy to defraud, and, as a result thereof, a fraud was worked upon the respondents. As above indicated, the verdict and judgment were against the four last mentioned persons. No verdict or judgment was obtained against the stockholders who had subscribed agreeing to pay par value, but were, by private arrangement with McDonald, to pay less. Mrs. McDonald owned no stock in the corporation, had no part in its management, and had no knowledge of the

contents of its books. The question presented by this appeal is whether the evidence shows that she was a party to the conspiracy. The complaint upon which the action was tried is comprehensive in its allegations, but the trial court, in submitting the cause to the jury, withdrew from their consideration all charges of fraud, except two; first, the allegation that all subscribers to the stock were to pay par value therefor, when, in truth and in fact, certain of the subscribers were to pay a less sum; and second, the alleged representation that the lands were paid for and free from encumbrances. In other words, the cause was submitted to the jury to determine whether it had been represented to the respondents, at the time they subscribed for their stock, that all stockholders were paying par and that the land was paid for and free from encumbrances. It is not claimed that Mrs. McDonald had any part in the immediate transaction by which the respondents were induced to purchase the stock. If she is to be held, it must be because the evidence shows that she had entered into a fraudulent conspiracy with the other persons sought to be held in the action, to misrepresent in the two matters which were submitted to the jury.

Before Mrs. McDonald can be held liable it must be shown that she was a party to the conspiracy prior to the time the respondents subscribed for stock. It is unnecessary to cite authorities to the proposition that, before a party can be held liable as a conspirator, the evidence must show that such person entered into an agreement with the other conspirators to accomplish the object of the conspiracy. A further proposition, for which there is ample authority and which is the rule in this state, is that, where the facts and circumstances relied on to establish a conspiracy to defraud are as consistent with a lawful purpose as an unlawful

undertaking, they are insufficient. 12 Corpus Juris, 639; *Dunlap v. Seattle Nat. Bank*, 93 Wash. 568, 161 Pac. 364. The question then arises whether the facts and circumstances as shown by the evidence in this case are sufficient to sustain the verdict of the jury and the judgment against the appellant. If the evidence is sufficient, it is by reason of three or four transactions with which she was connected, all of which occurred long subsequent to the time when the respondents subscribed for their stock. Consideration will now be given to these transactions or circumstances.

D. M. Drumheller had originally subscribed for 250 shares of the stock. James Newlands, who was the bookkeeper for the Spokane-Stanford Land Company in its Spokane office, and was also bookkeeper for D. K. McDonald in his individual matters, testified that McDonald, while in California, wrote, asking that money be sent him. He further testified that Mrs. McDonald took the Drumheller certificate of stock for 250 shares and left the office with it. That he delivered the certificate to her on instructions from Mr. McDonald. In about half an hour she returned to the office and gave the certificate back to him, saying that she had been down to see Mr. Drumheller and had expected some payment, but that it was not made. This testimony is specifically denied by both Mrs. McDonald and Mr. Drumheller, but after the verdict of the jury, the version of the transaction as given by Newlands must be accepted as true.

Another transaction was that with A. M. Sommer, who, at the time the corporation was organized, had purchased thirty-five shares of the capital stock. About a year after that, he testified that Mrs. McDonald called him up on the telephone and told him

she wanted to see him the next time he came into town. Shortly thereafter he went to the office and Mrs. McDonald told him that Mr. McDonald had written to her and told her that he wanted the witness Sommer to take twenty shares more of the stock, which was said to be stock which had been subscribed for by someone in California who did not take it. After talking with Mrs. McDonald, Mr. Sommer agreed to take the twenty shares.

Another circumstance relied on is an alleged declaration of Mrs. McDonald, made in the office in the presence of Newlands, the bookkeeper, about the month of August, 1917, when an action was pending for the appointment of a receiver for the corporation. Three notes aggregating $100,000 were drawn up in the office at that time, signed by Mr. McDonald and given, or to be given, to McKinnon, who was the person in whose name the option was taken and one of the persons held guilty in this action as a party to the fraudulent conspiracy. The bookkeeper testified that, if he remembered rightly, Mrs. McDonald was present at this time and said something about it being just another lie and would not hurt much. This was approximately three and one-half years after the respondents had subscribed for their stock.

There was evidence that Mrs. McDonald had expressed an opinion, subsequent to the time the enterprise was started, to a number of persons who testified, to the effect that the stockholders would make a considerable profit upon their investment.

There is one further matter in the evidence which should be referred to, and that is that Mr. Sommer testified that, when he purchased the additional twenty shares of stock, Mrs. McDonald told him that it had been originally owned by a man in California

who had died, and that his estate could not, or for certain reasons would not, go on with the purchase. This testimony, even though denied by Mrs. McDonald, must be accepted as true.

The evidence offered to support the verdict and judgment against Mrs. McDonald in her separate and individual capacity is not of that clear and satisfactory character necessary to establish a conspiracy. Her part in the Drumheller and Sommer transactions was at the request of her husband. The fact that a wife may do a business errand for her husband would not tend to show that she had, at some prior time, entered into a conspiracy with him and others to defraud. She had no knowledge of the enterprise except such impressions as she may have received from Mr. McDonald. The declaration which the bookkeeper testified she made in August, 1917, when the receivership action was pending, does not necessarily show that she was a party, three or four years before, to a conspiracy by which respondents were defrauded. The reason she is said to have given in the Sommer transaction why the twenty shares of stock were for sale bears no relation to the charge of fraud upon which this action was submitted to the jury. It was not a representation as to the value of the stock, or that all stock subscribers were to pay full value therefor, or that the land was fully paid for and free from encumbrance. It was at most an untruthful statement as to the reason why the stock was for sale.

It is true that it is not necessary, in order to establish the fraudulent conspiracy, that it be shown by direct evidence. It may be established by facts and circumstances; but, as above stated, these facts and circumstances must be inconsistent with an honest purpose and reasonably consistent only with the intent to defraud.

In the respondents' brief we are invited to read the complaint for a description of the nature and character of the conspiracy, but the allegations of the complaint were denied, and we must therefore look to the evidence alone to determine whether the charges have been sustained.

The appellant's abstract purports only to set out the evidence by which it was sought to connect Mrs. McDonald with the conspiracy. The supplemental abstract of the respondents does not question the correctness of this abstract or set out any additional evidence which would tend to show that the appellant was a party to the conspiracy. All the evidence abstracted on this question has been carefully considered, and we are of the opinion that the judgment appealed from cannot be sustained.

The judgment, as to the appellant in her individual capacity, will be reversed.

MACKINTOSH, TOLMAN, and MITCHELL, JJ., concur.

HOLCOMB, C. J., took no part.

[No. 15274. Department One. July 9, 1919.]

ALASKA PACIFIC STEAMSHIP COMPANY, *Respondent*, v. SPERRY FLOUR COMPANY, *Appellant*.[1]

INDEMNITY (9)—JUDGMENT (208)—CONCLUSIVENESS, AS AGAINST INDEMNITOR, OF FORMER ADJUDICATION AGAINST INDEMNITEE. Where a flour company and a steamship company were jointly sued for injuries sustained by a stevedore in a fall from a defective plank at the flour company's dock, a nonsuit in favor of the flour company, because of plaintiff's failure to show its control or responsibility for the plank in question, is not conclusive or *res judicata* as to the steamship company as to that fact, as between it and the flour company in the steamship company's subsequent action to recover over from the flour company on the latter's contract to furnish safe appliances while the ship was loading at the dock; since they were not adversaries in the former suit, and the steamship company had no control over plaintiff's presentation of his case. (*Seattle v. Erickson*, 99 Wash. 543, overruled.)

NEGLIGENCE (6)—USE OF PREMISES—INVITATION. A flour company maintaining docks and approaches for the use of ships loading flour owes the positive duty to keep its premises safe for the use of servants of others expected to use it.

INDEMNITY (7-2)—JOINT TORT-FEASORS. A flour company maintaining a dock and dolphins for the use of vessels loading flour owes the primary duty of keeping the same and their approaches reasonably safe; but where, from the nature of a dolphin and its tendency to sway with the surging of the ship, a plank approach to it was liable to become insecure, the steamship company's failure to inspect it before ordering a stevedore to use it might be an independent act of negligence on its part, making it a joint tort-feasor with the flour company, as to an injury sustained by a stevedore in attempting to use the plank, so that there could be no recovery over from the flour company by the steamship company after paying judgment recovered for the personal injuries sustained.

SAME (9) — JUDGMENT (208) — CONCLUSIVENESS, AS AGAINST INDEMNITOR, OF FORMER ADJUDICATION AGAINST INDEMNITEE. In an action by a stevedore against his master and the owner of a dock, used by invitation, for injuries sustained by reason of the defective condition of a plank approach, in which the master claimed that its codefendant was alone responsible, a judgment of nonsuit as to such codefendant, voluntarily accepted by it on failure of the

[1]Reported in 182 Pac. 634; 185 Pac. 583.

plaintiff to show its responsibility, followed by trial on the merits and judgment against the master, is *res judicata*, as between the codefendants, as to the four points tried out, (1) that the plank approach was insecurely fastened and unsafe, (2) that the master was liable to the servant for the injuries received, (3) that the servant had not contributed to the injury, assumed the risk, or been injured by a fellow servant, and (4) that his damages are shown by the judgment.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered August 8, 1918, upon the verdict of a jury rendered in favor of the plaintiff, in an action to recover over the amount paid in satisfaction of a judgment for personal injuries sustained by a longshoreman. Reversed.

Hayden, Langhorne & Metzger, for appellant.

Huffer & Hayden, for respondent.

TOLMAN, J.—This case was before this court on a prior appeal from a judgment on the pleadings, and that judgment having been reversed (94 Wash. 227, 162 Pac. 26), the pleadings were recast and the cause proceeded to trial upon the merits before a jury, which rendered a verdict in favor of respondent for the full amount demanded, and this appeal followed.

With one possible exception, the questions now involved were not raised by the former appeal, and a restatement of the facts and issues thus becomes necessary. In the light of the verdict, the following seems to be a fair statement. Respondent is a steamship company, which, at the time of the accident hereinafter mentioned, was operating a steamship between Tacoma and other ports. Appellant owned and operated a flour mill on the water front, in the city of Tacoma, and maintained in front of its premises a dock and dolphins for the use and convenience of ships coming to its mill to load its products. One of these dolphins consisted of a cluster of four or five piles

driven into the bed of the harbor, situated some ten or twelve feet from the shore, and there was a plank approach from the shore to the dolphin for the use of employees in passing back and forth to perform the duty of fastening and unfastening vessels using appellant's dock. In accordance with a previous agreement, at the time in question, respondent sent its ship, the Admiral Sampson, to appellant's dock to load flour. The vessel was moored to the dock and a line was passed from it to and secured about the dolphin referred to, for the purpose of holding the vessel in its place during the loading operations. After the loading was completed, one Joseph Egan, an employee of respondent, was, in the performance of his regular duties, sent to unfasten and cast off the line from the dolphin, and undertook in carrying out this duty to pass from the shore to the dolphin on the plank approach maintained by appellant for that apparent purpose. While Egan was moving along the plank and about half way from the shore to the dolphin, the end of the plank slipped off of the dolphin, and Egan was precipitated upon the rocks below, and sustained serious personal injuries. Egan brought suit against both the respondent and appellant, alleging in his complaint that the plank connecting the dolphin with the shore, the slipping of which caused his injuries, was a part of the plant of appellant; that the plank was insecurely fastened and was unsafe, all of which was unknown to him, "but the fact that it was insecurely fastened and was unsafe and dangerous was well known, and should have been well known, to the defendants, and that said defendant Sperry Flour Company had carelessly and negligently constructed the same in an unsafe and dangerous position, and had carelessly and negligently allowed the same to become out of repair. And that the defendant Alaska

Pacific Steamship Company had carelessly and negligently used said dolphin and the plank connecting the same with the shore, when the same was in a dangerous and unsafe condition, and dangerous for the use which it was put to, which danger was unknown to the plaintiff, but well known, or in the exercise of reasonable care and inspection should have been well known, to the defendants and each of them."

Each of the parties defendant answered to Egan's complaint, denying the negligence charged against it, and denying information or knowledge sufficient to form a belief as to the negligence charged against the other, and respondent, in its answer, reiterated the allegation that the plank approach was constructed and maintained as a part of the plant of the Sperry Flour Company. The cause proceeded to trial before a jury, and at the close of the plaintiff's case, the Sperry Flour Company moved for and obtained a judgment of dismissal in its favor because of the failure of Egan to prove that it furnished, controlled, or was in any way responsible for the plank approach to the dolphin. The respondent did not at any time in that action give notice to appellant that it claimed that appellant was liable over to it, and did not tender to appellant the defense of that action, as is customary in cases where a liability over is thought to exist. After the dismissal of appellant therefrom, the Egan case proceeded against respondent, it alone defending, and resulted in a verdict and judgment in favor of Egan and against respondent. Having paid that judgment, respondent brought this action to recover the amount expended by it in defense of the Egan suit, in medical and hospital charges which it incurred in caring for Egan after he was injured, and the amount paid in satisfaction of the Egan judgment, upon the theory that it was appellant's duty to furnish respondent and

its employee Egan with a safe approach to the dolphin, and that the injuries to Egan were wholly due to the failure to perform its duty in that respect.

Prior to the former appeal, in addition to the general denials and the affirmative answer discussed in our former opinion, appellant had pleaded affirmatively that the judgment of dismissal entered in the Egan case as to it was a bar to this action, to which plea respondent had replied, setting up other matters of record in the Egan suit, but not, of course, denying the entry of that judgment. After the case was sent back on remittitur, the trial court, apparently upon the theory that, as the appeal had been taken from a judgment upon the pleadings in favor of the defendant, this court would have sustained that judgment had the uncontroverted allegations of either affirmative answer constituted a good defense, on motion struck the plea of *res judicata,* and this is the first error assigned.

It must be admitted that, if the judgment for the defendant upon the pleadings could have been sustained upon any ground, it was the duty of this court to affirm it, no matter how erroneous may have been the reasoning of the trial court in arriving at that judgment. And respondent contends that, by reversing the former judgment, we have determined as the law of the case that no defense was stated by the admitted facts of the answer, notwithstanding the fact that the defense of *res judicata* was nowhere discussed or even mentioned in our former opinion That there is authority to sustain this view, we have no doubt. *State ex rel. Nicomen Boom Co. v. North Shore Boom & Driving Co.,* 62 Wash. 436, 113 Pac. 1104; 4 C. J. 1105; *Morrison v. Kuhn,* 80 Fed. 740; *In re Cook's Estate,* 143 Iowa 733, 122 N. W. 578; *Western Union Tel Co. v. Sutton,* 140 Ky. 729, 131

S. W. 773; *McKinney v. State ex rel. Nixon,* 117 Ind. 26, 19 N. E. 613; *Harwi Hardware Co. v. Klippert,* 73 Kan. 783, 85 Pac. 784.

However that may be, we are now of the opinion that the judgment in the Egan case, which was a judgment of nonsuit only, is not a bar to this action, because, even though treated as a judgment on the merits, appellant and respondent were not adversaries in that case. Egan controlled the introduction of the evidence, and because he deemed it unnecessary or found it impossible to there produce evidence tending to show that appellant constructed and maintained the plank approach as a part of its plant, still respondent was in nowise responsible for such failure of proof, had no means of preventing it or supplying the deficiency, and could not be bound thereby. *Pullman Co. v. Cincinnati N. O. & T. P. R. Co.,* 147 Ky. 498, 144 S. W. 385; *Keagy v. Wellington Nat. Bank,* 12 Okl. 33, 69 Pac. 811; *Broadway Coal Min. Co. v. Robinson,* 150 Ky. 707, 150 S. W. 1000.

Appellant, upon this point, relies chiefly upon two cases from this court; the first, *Seattle v. Northern Pac. R. Co.,* 63 Wash. 129, 114 Pac 1038, is clearly distinguishable upon the facts, and the principle involved so clearly so that it is wholly unnecessary for us to discuss it here; the other case, *Seattle v. Erickson,* 99 Wash. 543, 169 Pac. 985, is not so easily disposed of. Had the court there rested its decision upon the fact that there was no evidence that the injury was due to the negligence of the respondent, who was then defending against the attempt of the city to hold him liable over because of the terms of the contract with him, as the fact is stated to be, the result would have been the same, and the court would have gone as far as was necessary to a decision of that case, and as far as the pleadings justified. We think, so far as it

is based upon the defense of *res judicata,* that case must be overruled. Upon this point appellant also relies upon the case of *Kansas City v. Mitchener,* 85 Mo. App. 36, which, though it seems to support the position contended for, is, we think, against the great weight of authority including the cases we have heretofore cited, and contrary to the doctrine laid down in 1 Freeman, Judgments (4th ed.), § 158; 2 Black, Judgments (2d ed.), § 618; and 1 Herman, Estoppel and Res Judicata, § 136. We conclude that the trial court did not err in striking the defense of *res judicata.*

It is urged that the trial court erred in refusing a set of instructions proposed by appellant, the purpose of which was to tell the jury that, if respondent knew, or in the exercise of reasonable care on its part should have known, of the defective and unsafe condition of the plank approach, and nevertheless directed or permitted Egan to use the same, it thereby committed an independent act of negligence, or was guilty of contributory negligence to an extent which would make it a joint tort-feasor and defeat its right of recovery. So far as Egan was concerned, both of the parties hereto were under equal obligation to refrain from using or permitting the use of unsafe appliances; but, as between themselves, an entirely different question is presented. The trial court correctly instructed the jury to the effect that,

"When by arrangement between two persons the one comes upon the premises of the other for a business purpose common to both, the owner of the premises is in law deemed to have invited the other thereon for such common purpose and such invitation includes all employees of the person invited, the services of whom are necessary, convenient or proper in the accomplishment of such purpose, and in such case it becomes the duty of the invitor to use reasonable care in keeping in a reasonably safe and secure condition

all parts of his premises where the person invited and his servants may find it necessary or convenient to be or to work in the accomplishment of such purposes."

And under this rule, which is well sustained by authority, appellant had a positive duty to perform, which could only be discharged by putting and keeping that portion of its premises which respondent and its servants were expected to use in a reasonably safe condition for such use. *Brezee v. Powers,* 80 Mich. 172, 45 N. W. 130; *Ryerson v. Bathgate,* 67 N. J. L. 337, 51 Atl. 708, 57 L. R. A. 307; Cooley, Torts, 718.

Notwithstanding this duty, which made appellant primarily liable as between the parties hereto, still, if respondent, by some independent act of negligence on its part, caused or contributed to the accident, it would thereby become a joint tort-feasor and could not recover. In *Alaska Steamship Co. v. Pacific Coast Gypsum Co.,* 71 Wash. 359, 128 Pac. 654, and 78 Wash. 247, 138 Pac. 875, it was held, in effect, that if the employer (situated as is the respondent here) had knowledge, or should have had knowledge, of the defective and dangerous condition of the appliance and knowingly acquiesced in its use, he could not recover against the person who would have been primarily liable had not such knowledge existed; and that the existence of such knowledge, or the want of it, was a fact to be decided as other facts in the case; and unless the evidence was so conclusive thereon as to lead the minds of all reasonable men to the same conclusion, it could not be decided by the court as a matter of law, but should be left to the determination of the jury. The case of *Puyallup v. Vergowe,* 95 Wash. 320, 163 Pac. 779, is not out of harmony with this decision, for there it was held that the city, which sought to recover over against a contractor, had been held in the original action to be guilty of an independent act of negligence

which made it a joint tort-feasor. In *Seattle v. Great Northern R. Co.*, 103 Wash. 294, 174 Pac. 4, it was held that, if the city contributed to the injury by the construction of a defective sidewalk, or by permitting the defect to exist for an unreasonable length of time without repairs, it could not recover over from one who caused a settling of the ground on which the sidewalk was constructed, because by its own negligence it had become a joint tort-feasor; and it appearing that the lower court as the trier of the facts had so found, the judgment was affirmed.

In *Alaska Steamship Co. v. Pacific Coast Gypsum Co., supra,* it appeared that the Gypsum Company had complete charge and control of the appliance, excepting only that the Steamship Company's employees filled the buckets and placed them upon the hook of the hoist; while here the plank approach was at least as much under respondent's control during the loading operations as it was under the control of appellant; and there was abundant evidence in the case from which the jury might have found that it was customary and usual for this or any other dolphin to sway to a considerable extent with the surging of the ship, which was tied to it; and that such swaying and its probable effect upon the plank approach to the dolphin were well known to respondent and were such that its failure to inspect was an independent act of negligence upon its part which caused or contributed to the injury. The nature of this appliance and the manner of its use might to the jury seem very different from that of some fixed or stationary part of appellant's plant which an experienced and careful person might, under the circumstances, assume to be safe without actual or careful inspection. By the refusal of appellant's proposed instructions, heretofore referred to, the jury was left without any guide or direc-

tion upon the question of whether or not the respondent had, by some independent act of its own, become a joint tort-feasor, and was left to determine the case solely upon the question of whether or not appellant had furnished the plank approach as part of its plant. This, we think, was error.

In view of the necessity of a new trial, we may say for the guidance of the trial court that we have examined into the error assigned upon instructions as to the force and effect of the judgment in the Egan case; and in view of the fact that appellant sought that dismissal voluntarily upon its own motion after the plaintiff's case had been presented to the jury, and after knowledge obtained from the pleadings of the fact that its codefendant claimed that it was responsible for the construction and maintenance of the plank approach, and notwithstanding the failure to at any time tender to it the defense of the action on behalf of the respondent, still the judgment was binding upon it in the four particulars named, *i. e.*, it was proof that the plank approach was insecurely fastened, unsafe and dangerous; that respondent was liable to Egan for the injuries received; that Egan was not guilty of contributory negligence, had not assumed the risk, and that no negligence of a fellow servant had intervened; and that Egan's damages were as shown by that judgment. *City of Detroit v. Grant,* 135 Mich. 626, 98 N. W. 405; *Chicago v. Robbins,* 2 Black (67 U. S.) 418; *Robbins v. Chicago,* 4 Wall. (71 U. S.) 657; *Oceanic Steam Nav. Co. v. Campania Transatlantica Espanola,* 144 N. Y. 663, 39 N. E. 360; *Spokane v. Crane Co.,* 98 Wash. 49, 167 Pac. 63; *Bevan v. Muir,* 53 Wash. 54, 101 Pac. 485, 32 L. R. A. (N. S.) 588.

The other assignments of error are sufficiently disposed of by what has been said, or relate to matters which are not likely to recur upon another trial.

Judgment reversed, and remanded with instructions to grant appellant's motion for a new trial.

MAIN, MITCHELL, and MACKINTOSH, JJ., concur.

ON REHEARING.

[*En Banc.* November 19, 1919.]

PER CURIAM.—Upon a rehearing *En Banc*, a majority of the court adhere to the opinion heretofore filed herein, and for the reasons there stated, the judgment is reversed.

[No. 15299. Department One. July 9, 1919.]

N. NISHIMOTO, *Respondent*, v. R. D. VERNON *et al.*, *Appellants*, E. A. CARLTON, *Respondent*.[1]

APPEAL (48)—DECISIONS REVIEWABLE—FINAL ORDERS. An order striking an answer of one of the defendants is not appealable because it is not a final order within the contemplation of Rem. Code, § 1716.

HUSBAND AND WIFE (88)—COMMUNITY PROPERTY—ACTIONS—RIGHT OF WIFE TO DEFEND. In an action for damages for breach of a contract made by a husband for the sale of personal property, the wife is not entitled to separately answer and show that the property was her separate property, where no judgment was sought against her individually or affecting her separate estate.

APPEAL (148)—EXCEPTIONS TO CONCLUSIONS. It is not necessary to take exceptions to conclusions of law.

PARTNERSHIP (55) — ACTIONS — CERTIFICATE OF ASSUMED NAME. Objections to a codefendant's maintenance of a cross-complaint upon a contract made by him in an assumed name, without the precedent filing of the certificate as to assumed names, as required by Rem. Code, § 8369, is not available to one who consented to the introduction of the certificate in evidence.

Appeal from a judgment of the superior court for King county, Ralston, J., entered December 13, 1918,

[1]Reported in 182 Pac. 617.

upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

Mitchell & Lawrence, for appellants.

George Gregory, for respondent Carlton.

J. Grattan O'Bryan, for respondent Nishimoto.

MITCHELL, J.—In consideration of $500, as earnest money and part payment of the purchase price paid by N. Nishimoto to Carlton & Hegens, agents for R. D. Vernon, vendor, a written contract was entered into for the sale to Nishimoto of the furniture and furnishings in the Hotel Perrin, Seattle, Washington, and for procuring from the owners of the building consent to the assignment of the lease which the vendor held. The total price to be paid was $8,000, one-half cash, the other in deferred payments. The contract provided for the return of the $500 if the seller was unable to deliver the property with good title within five days from the date of the contract, and for the forfeiture of the $500 if the purchaser failed to comply with his part of the agreement. This much of the contract was signed by Carlton & Hegens, agents, and by N. Nishimoto. Below their signatures, the contract continues and is signed as follows:

"I approve the above receipt and agreement and agree to pay to Carlton & Hegens, as my agents, the sum of three hundred and fifty dollars ($350) for services rendered when deal is completed, or one-half of earnest money receipted for hereon in case same is forfeited.

"I hereby covenant that I am the owner of the above described property and have the legal right to sell the same. R. D. Vernon, Vendor."

Upon the failure and refusal of Vernon to deliver the property within and after the time mentioned, and upon demand of Nishimoto for the return of the $500,

and refusal of the seller and his agent to make return, this action was instituted on the contract to recover judgment against Carlton & Hegens and R. D. Vernon, individually, and the community consisting of himself and Harriett Vernon, his wife. R. D. Vernon answered for himself and wife, putting in issue the allegations of the complaint. E. A. Carlton, doing business as Carlton & Hegens, answered, in effect admitting the allegations of the complaint, and at the same time, apparently without any objections to the procedure, filed a so-called cross-complaint against R. D. Vernon, individually, and the community consisting of himself and wife, for $350 commission, as provided for in the contract. The allegations of the cross-complaint were denied by R. D. Vernon for himself and wife.

The cases were tried by the court without a jury. Findings of fact were made and entered conforming to the allegations of the complaint of Nishimoto and the complaint of Carlton against Vernon and wife. Among other things, the court found that, in signing the contract, R. D. Vernon acted for himself and the community composed of himself and Harriett Vernon, his wife; that the plaintiff was ready, able and willing to perform the contract, and that he made a demand upon defendants for performance of their part or for the return of the $500, which was refused by defendants; and that Vernon and wife refused to perform the contract without any justifiable reason. Suitable conclusions of law were also made and entered. Upon the findings and conclusions, judgment was entered in favor of Nishimoto against defendant Carlton for the return forthwith of the $500 still held by him, with costs against Carlton and Vernon and wife, and in the event of the failure of Carlton to forthwith return the $500, plaintiff should have judgment against Carlton and R. D. Vernon and the marital community of R. D.

Vernon and Harriett Vernon, his wife, for the sum of $500. It was further provided therein that Carlton have judgment upon his complaint against R. D. Vernon and the marital community of R. D. Vernon and Harriett Vernon, his wife, for the sum of $350.

Defendant R. D. Vernon, for himself and the community, has appealed. It may be here noticed that, in framing the issues, Harriett Vernon, appearing separately for herself and the community composed of herself and husband, filed an amended answer to the Carlton complaint, which amended answer was, upon motion, ordered stricken from the files. Thereupon she served and filed a notice of appeal from that order. Such notice of appeal is ineffectual, notwithstanding her joining her husband in his appeal bond, which, among other things, refers to the order as appealed from, because such an order is not a final order or judgment within the contemplation of Rem. Code, § 1716, which enumerates the determinations that may be appealed from.

There is a large number of assignments of error which may be readily considered in groups.

I. In settling the pleadings, Harriett Vernon, appearing separately from her husband, unsuccessfully attempted to answer for herself, individually, and for the marital community of herself and husband, R. D. Vernon, plaintiff's complaint, and also the complaint of Carlton; and at the trial, although there was some proof to show the hotel furniture and furnishings were the property of Mrs. Vernon in her separate right and of her daughter, the court refused to allow evidence of any necessity for Mrs. Vernon's signature to make a binding contract to sell. The rulings were not erroneous. The complaints were upon contracts, and judgments were sought that in no way affected Mrs. Vernon in her own right and property.

II. Other than one assignment of error to be mentioned later, all the remaining assignments that need be noticed call in question the findings of fact and conclusions of law made and entered by the trial court. It was not necessary to take exceptions to the conclusions of law. *Katterhagen v. Meister,* 75 Wash. 112, 134 Pac. 673. Proper exceptions having been taken to all the essential findings of fact, we are called upon to decide if they are warranted by the evidence. An examination of the evidence shows that, although not without conflict in some respects, it abundantly supports and preponderates in favor of the findings made.

Lastly, it is contended that, as E. A. Carlton alone was doing business in the firm name of Carlton & Hegens, he was not entitled to maintain his action against appellant without alleging and proving the execution of and filing in the county clerk's office a certificate setting forth such fact, as required by Rem. Code, § 8369 *et seq.* If that law is applicable generally in such cases as this, appellant cannot complain here, for the record shows that, at the trial, his attorney furnished, requested and consented to the introduction in evidence of a certified copy of such business certificate made and filed in the clerk's office by Carlton long prior to the trial.

Finding no error, the judgments are affirmed.

HOLCOMB, C. J., TOLMAN, MAIN, and MACKINTOSH, JJ., concur.

[No. 15194. Department One. July 14, 1919.]

In re LOUISE CHARTRAND.[1]

INFANTS (4) — CUSTODY OF DELINQUENTS — PROCEEDINGS. Rem. Code, § 2312, requiring the dismissal of prosecutions where the accused is not brought to trial within sixty days, applies only to criminal prosecutions, and not to proceedings against a delinquent child, under Rem. Code, § 1987-1, par. 6, of the juvenile act.

SAME (4)—PROCEEDINGS—POWER OF COURT—HABEAS CORPUS. The superior court, sitting for the hearing of a writ of habeas corpus in behalf of a minor charged to be a delinquent child, has power to act as a court in juvenile matters and may treat the application as a motion for a change of custody.

Appeal from an order of the superior court for Chelan county, Neal, J., entered August 30, 1918, holding a minor for trial upon a complaint charging delinquency, upon a hearing upon application for habeas corpus. Appeal dismissed.

C. B. Conner, for appellant.

W. F. Whitney and *Burt J. Williams,* for respondent.

MACKINTOSH, J.—The petitioner, on June 8, 1917, was complained against as a delinquent minor. A hearing was had upon this complaint in the petitioner's absence, and an order was made finding her to be a delinquent and committing her to an institution. On March 7, 1918, the petitioner, by writs of habeas corpus sued out in both Chelan and King counties, sought her release from such institution. The writs having been denied, appeals were taken to this court and were disposed of in *In re Chartrand,* 103 Wash. 36, 173 Pac. 728.

After the judgment of this court was pronounced, holding that the superior court of Chelan county had

[1]Reported in 182 Pac. 610.

jurisdiction of the matter, the hearing on the writ was held in that county in August, 1918, the court ordering the petitioner from the custody of the institution for the reason that the order committing her had been made in her absence. The court further ordered the petitioner held for trial upon the original complaint filed in the matter of her delinquency. From this portion of the order, the petitioner has appealed, claiming that more than sixty days having elapsed since the filing of the complaint, without trial, she is entitled to her release by virtue of Rem. Code, § 2312.

In our opinion, the section referred to does not cover complaints or petitions brought under the provisions of the juvenile act, but refers to criminal prosecutions. The petitioner was proceeded against under Rem. Code, § 1987-1, par. 6, being a portion of the act referring to juveniles. The court sitting for the determination of the writ of habeas corpus, at the same time had power to act as a court in juvenile matters, and was at liberty to treat petitioner's application for writ of habeas corpus as an application in the nature of a motion for a change of custody. That the court has this dual capacity has been held by us in *State ex rel. De Bit v. Mackintosh,* 98 Wash. 438, 167 Pac. 1090; *State ex rel. De Bit v. Superior Court,* 103 Wash. 183, 173 Pac. 1014, and *In re Rising,* 104 Wash. 581, 177 Pac. 351.

The appeal is dismissed.

HOLCOMB, C. J., MAIN, TOLMAN, and MITCHELL, JJ., concur.

[No. 15258. Department Two. July 14, 1919.]

LOUIS SINGER, *by his Guardian etc., Respondent,* v. METZ COMPANY, *Appellant.*[1]

MASTER AND SERVANT (172, 182)—NEGLIGENCE OF SERVANT—SCOPE OF EMPLOYMENT—EVIDENCE. The defendant's admission of ownership of an automobile causing damages, and that the one driving it was in his employ, establishes a *prima facie* case against the owner upon the question of the driver's acting in the course of his employment.

EVIDENCE (34)—BURDEN OF PROOF—SHIFTING. The making of a *prima facie* case by plaintiff does not of itself result in the shifting of the burden of proof as to any facts which are necessary to sustain the plaintiff's right of recovery not admitted by the defendant, though defendant admitted facts raising presumptions making a *prima facie* case for plaintiff.

MASTER AND SERVANT (172, 182)—EVIDENCE (34)—INJURY TO THIRD PERSON—SCOPE OF EMPLOYMENT—SHIFTING BURDEN OF PROOF. In an action for personal injuries sustained through the negligent driving of an automobile, defendant's admission of ownership and that the driver was in his employ at the time of the collision, does not shift the burden of proof, which is still upon the plaintiff to establish that the driver was acting in the course of his employment at the time of the collision.

Appeal from an order of the superior court for King county, Gilliam, J., entered October 24, 1918, granting a new trial, after the verdict of a jury rendered in favor of the defendant, in an action in tort. Reversed.

J. Speed Smith and *Henry Elliott, Jr.*, for appellant.

Russell & Blinn (J. W. Russell, of counsel), for respondent.

PARKER, J.—The plaintiff, Singer, seeks recovery of damages for personal injuries which it is claimed resulted to him from the negligent driving af an automobile owned by the defendant, the Metz Company, while being driven by an employee of that company in the course of his employment. Trial upon the merits

[1]Reported in 182 Pac. 614; 186 Pac. 327.

in the superior court for King county, sitting with a jury, resulted in a verdict in favor of the Metz Company, following which the court entered an order awarding Singer a new trial, upon his motion made in that behalf, which order was by the trial court, as stated therein, rested upon the ground of "error in the charge of the court to the jury upon the trial." The Metz Company has appealed from that order.

This is a second appeal in this case. Upon the first appeal, the court awarded Singer a new trial because of error committed by the trial court in the admission of certain evidence. Our decision upon that appeal appears in *Singer v. Metz Co.*, 101 Wash. 67, 171 Pac. 1032. The only question here presented calling for serious consideration is as to whether or not the trial court erred upon the second trial in instructing the jury touching the question of the burden of proof.

While the evidence was being introduced in Singer's behalf before his case was rested, it was admitted in the presence of the jury, in behalf of the Metz Company, that it was the owner of the automobile when it came into collision with Singer's motorcycle, which collision resulted in his injury, and that Helvey, the driver of the automobile, was then an employee of the Metz Company. No further evidence was introduced in Singer's behalf tending to show that Helvey was, at the time driving the automobile, in the course of his employment by the Metz Company; counsel for Singer relying alone upon these admitted facts and the presumption arising therefrom as being sufficient to carry the case to the jury upon the question of Helvey then acting in the course of his employment for the Metz Company. It appears from the testimony of Helvey given upon the trial in behalf of the Metz Company that he was in its employ as salesman of automobiles, and as such was authorized to drive

its automobiles in making demonstrations and showing the automobiles to prospective purchasers; that, on the day before the occurring of the injury to Singer, Helvey procured from the manager of the Metz Company the key to the room where this automobile was kept, telling the manager that he "wanted to make a demonstration"; that, at about 7 o'clock the next morning, he took the automobile, intending to go on a pleasure drive to Snoqualmie Falls and take with him his wife, his brother-in-law, and two lady friends of his brother-in-law; that soon thereafter he met his wife and brother-in-law on the street in Seattle, as had previously been arranged; that they then got into the automobile, when they drove along Fourth avenue towards the Young Women's Christian Association building to get the two lady friends; that, before reaching the Young Women's Christian Association building, the collision occurred between the automobile and respondent's motorcycle, resulting in Singer's injury, at about 7:30 o'clock in the morning; and that he did not intend to, and did not, on that day, demonstrate or exhibit the car to a prospective purchaser.

The trial judge used language in the beginning of his instructions to the jury defining the issues of fact to be decided, wherein we think he plainly assumed the fact that the automobile was owned by the Metz Company, the fact that the automobile, at the time respondent was injured, was being driven by Helvey, and the fact that Helvey was then an employee of the Metz Company. This was in harmony with admissions made during the trial before Singer's case was rested. We note these assumptions of fact by the trial court in the defining of the issues to be decided by the jury as negativing any thought that the jury would get the notion that there was any burden of proof upon respondent to establish them. Among other questions

stated by the court in its instructions to be decided by the jury was:

"Whether or not the driver of the automobile at the time of the alleged accident was engaged in the performance of the duties of agent of the defendant The Metz Company."

Touching the question of burden of proof, the trial judge instructed the jury as follows:

"The burden of proving negligence upon the part of the driver of the automobile, and also whether or not the defendant Helvey was the agent of the defendant The Metz Company, and was engaged in the business of the defendant, The Metz Company at the time of the alleged accident, is upon the plaintiff in order to fix liability upon the defendant The Metz Company, and before the plaintiff would be entitled to a verdict against the defendant The Metz Company, he must prove such negligence, and such agency by a fair preponderance of the evidence in the case."

Other instructions given were of the same import, in so far as they touched the question of burden of proof; but none of them came any nearer telling the jury that there was any burden resting upon Singer to establish by proof the admitted fact of ownership of the automobile, of Helvey driving the automobile at the time Singer was injured, or of Helvey being then an employee of the Metz Company.

Counsel for Singer argue, and the trial court in awarding him a new trial manifestly proceeded upon the theory, that these admissions made in behalf of the Metz Company removed the burden of proof from Singer as plaintiff, not only as to these admitted facts, but also as to the question of Helvey acting for the Metz Company in the course of his employment at the time in question, and that, therefore, the court fell into error in the giving of that and parts of other instructions of the same import touching the question

of burden of proof. We think it is plain, as already noticed, that these instructions, read as a whole, meant only that the burden of proof rested on respondent as to the question of whether or not Helvey was acting in the course of his employment for the Metz Company at the time in question. Counsel for Singer invoke the general rule that, in cases of this nature, the admission of ownership of the vehicle causing the damage, and the admission by the owner that the one driving it was at the time an employee of the owner, establishes a *prima facie* case against the owner in favor of the person suffering such damage, in so far as the question of the driver then acting in the course of his employment for the owner is concerned. Our attention is called to numerous decisions of this court announcing in substance this to be the law. The argument seems to be that, because of the establishing of a *prima facie* case in Singer's behalf by these admissions, in so far as we are concerned with the question of Helvey acting in the course of his employment for the Metz Company at the time in question, therefore the burden of proof as to that question was removed from respondent and put upon appellant. Now the making of a *prima facie* case by plaintiff does not of itself call for the final deciding of the case or of some controlling fact therein in favor of the plaintiff, but only calls for the submission of the case to the jury, if the case is being tried by a jury, and does not result in shifting the burden of proof from the plaintiff to the defendant as to any facts which are necessary to the sustaining of the plaintiff's right of recovery and not admitted by the defendant, though there be facts admitted by the defendant raising presumptions making a *prima facie* case for the plaintiff. In *Smith Sand & Gravel Co. v. Corbin*, 75 Wash. 635, 135 Pac. 472, we said:

"Some contention is made rested upon the alleged shifting of the burden of proof. It is said that the admission of the making of the contract on the part of respondent, in effect, constituted the making of a *prima facie* case against him; upon which counsel seem to argue that this resulted in shifting the burden of proof. We do not understand that the establishing of a *prima facie* case sufficient to go to the jury has the result of shifting the burden of proof. The jury are not necessarily bound to find for the plaintiff upon the making of a *prima facie* case. *Prima facie* case means only that the case has proceeded upon sufficient proof to that stage where it must be submitted to the jury, and not decided against the plaintiff as a matter of law. A *prima facie* case does not necessarily mean that judgment goes in favor of the plaintiff as a matter of law. The jury are still the judges of the sufficiency of the showing to call for a verdict in plaintiff's favor, and where there is no affirmative defense, strictly speaking, the jury are to measure plaintiff's rights, having in view that he has the burden of proof."

In *Sweeney v. Erving,* 228 U. S. 233, 240, Justice Pitney, speaking for the supreme court of the United States touching the presumption arising under the doctrine of *res ipsa loquitur,* said:

"In our opinion, *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. *Res ipsa loquitur,* where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff.

"Such, we think, is the view generally taken of the matter in well-considered judicial opinions.

"*Kay v. Metropolitan St. Ry. Co.*, 163 N. Y. 447, was an action by passenger against carrier, and the New York Court of Appeals said (p. 453): 'In the case at bar the plaintiff made out her cause of action *prima facie* by the aid of a legal presumption (referring to *res ipsa loquitur*), but when the proof was all in the burden of proof had not shifted, but was still upon the plaintiff . . . If the defendant's proof operated to rebut the presumption upon which the plaintiff relied, or if it left the essential fact of negligence in doubt and uncertainty, the party who made that allegation should suffer, and not her adversary. The jury were bound to put the facts and circumstances proved by the defendant into the scale against the presumption upon which the plaintiff relied, and in determining the weight to be given to the former as against the latter, they were bound to apply the rule that the burden of proof was upon the plaintiff. If, on the whole, the scale did not preponderate in favor of the presumption and against defendant's proof, the plaintiff had not made out her case, since she had failed to meet and overcome the burden of proof.' "

In *Briglio v. Holt & Jeffery*, 85 Wash. 155, 147 Pac. 877, we adopted this view of the Federal supreme court touching the presumptions arising under the doctrine of *res ipsa loquitur* as affecting the burden of proof.

In 10 R. C. L. 897, the learned editors state the law applicable to situations such as are here involved, as follows:

"The term 'burden of proof' has two distinct meanings. By the one is meant the duty of establishing the truth of a given proposition or issue by such a quantum of evidence as the law demands in the case in which the issue arises; by the other is meant the duty of producing evidence at the beginning or at any subsequent stage of the trial, in order to make or meet a *prima facie* case. Generally speaking, the burden of

proof, in the sense of the duty of producing evidence, passes from party to party as the case progresses, while the burden of proof, meaning the obligation to establish the truth of the claim by a preponderance of evidence, rests throughout upon the party asserting the affirmative of the issue, and unless he meets this obligation upon the whole case he fails. This burden of proof never shifts during the course of a trial, but remains with him to the end."

We conclude that the burden of proof in this case remained upon Singer, as plaintiff, until the conclusion of the trial, in so far as the question of Helvey acting in the course of his employment for the Metz Company while driving the automobile at the time it came in collision with respondent's motorcycle and caused the injury for which recovery is sought in this action is concerned; and this, we think, is all that the instructions touching the question of burden of proof meant or conveyed to the minds of the jurors, and that, therefore, the court did not err in the giving of such instructions.

But one other instruction was given by the trial court which was excepted to by counsel for Singer, but they do not now argue that such instruction was erroneous, and it seems quite clear to us that it was not erroneous. We are of the opinion, therefore, that, since the trial court awarded Singer a new trial because of what it conceived to be error in the instructions given and excepted to, which instructions we find were not erroneous, it fell into error in awarding a new trial upon that ground. The order awarding Singer a new trial must, therefore, be reversed and set aside, and the cause remanded to the trial court with direction to enter judgment in favor of the Metz Company in accordance with the verdict of the jury. It is so ordered.

In this case, as originally commenced, it appears that Singer sought recovery against Helvey as a defendant, as well as against the Metz Company. We note that the only verdict appearing in the record before us is in favor of the defendant the Metz Company, and that counsel upon both sides have presented the case here in their briefs as though the controversy was only one between Singer and the Metz Company. We have therefore ignored Helvey as a defendant in the case.

HOLCOMB, C. J., MOUNT, and FULLERTON, JJ., concur.

ON REHEARING.

[*En Banc.* December 17, 1919.]

PER CURIAM.—Upon a rehearing *En Banc,* a majority of the court adhere to the opinion heretofore filed herein, and for the reasons there stated, the order awarding Singer a new trial is reversed and set aside, and the cause remanded to the trial court with direction to enter judgment in favor of the Metz Company in accordance with the verdict of the jury.

[No. 15261. Department Two. July 14, 1919.]

The State of Washington, *Respondent*, v. William Conner, *Appellant*.[1]

Continuance (22)—Absence of Witness—Admission to Prevent Continuance. Under the express provision of Rem. Code, § 2135, a continuance on account of the absence of a witness, is properly denied where the prosecuting attorney admitted that the witness would testify, as claimed, the same as upon a former trial and such testimony was read to the jury.

Intoxicating Liquors (48, 50) — Unlawful Possession — Evidence—Sufficiency. Under Rem. Code, § 6262-23, making possession of more than two quarts of intoxicating liquors prima facie evidence that it was kept for unlawful sale or disposition, proof of the possession of twenty-three quarts of whiskey raises a question for the jury, notwithstanding defendant testified to its lawful acquisition and that it was kept for his personal use.

Same (51)—Offenses—Instructions. In a prosecution for illegal possession of intoxicating liquors, an instruction that there could be no conviction if the accused had an illegal quantity in his possession which he intended to be drunk by himself and guests at his private apartments is favorable to the accused.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered July 8, 1918, upon a trial and conviction of violating the state-wide prohibition law. Affirmed.

Cooley, Horan & Mulvihill, for appellant.

Lloyd L. Black and *Jesse H. Davis*, for respondent.

Holcomb, C. J. — This appeal is prosecuted from judgment on verdict, under an information charging that:

". . . in the county of Snohomish, state of Washington, on or about the 13th day of February, 1918, then and there being, the said defendant, William Conner, did then and there wilfully and unlawfully keep and have in his possession intoxicating liquor,

[1]Reported in 182 Pac. 602.

to-wit: 23 quarts of whiskey, with intent to sell, barter, exchange, give away, furnish and otherwise dispose of the same in violation of law, contrary to the form of the statute, etc."

When the case was called for trial, the appellant moved for a continuance, in support of which he submitted an affidavit reciting that his wife, who was a material witness for the defense, was then confined in bed, having been taken ill the night previous; that the testimony of the witness is fully set forth in the evidence given by her at the former trial of this cause. Whereupon the prosecuting attorney admitted that the absent witness, if present, would testify as stated in the motion. Appellant stated to the court that his wife was suffering from grippe; that he had not called a doctor, but when he left that morning he told her to get Dr. Jacobson. The motion for continuance was overruled, which the appellant assigns as error.

As the testimony of the absent witness was read in evidence, the motion for continuance was rightly overruled, in view of the admission of the prosecuting attorney, the statute providing that,

"A continuance may be granted in any case on the ground of the absence of evidence, on the motion of the defendant, supported by affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it, and also the name and place of residence of the witness or witnesses, and the substance of the evidence expected to be obtained; and if the prosecuting attorney admit that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the continuance shall not be granted." Rem. Code, § 2135.

The frequent abuse of the right to obtain a continuance has induced stricter vigilance by the courts to prevent such abuse. The very nature of the relief

requested is such that the decision of the question necessarily rests almost entirely upon the discretion of the trial court, and we are not inclined to interfere with such discretion unless abused to the extent of prejudicing the applicant's right to a fair trial.

It is also contended that the evidence was insufficient to sustain the conviction. It is not disputed that twenty-three quarts of whiskey were found by the raiding party in appellant's apartments, but he contends that this was kept by him for his own consumption, to be drunk in his home by himself and guests; that there was no evidence to go to the jury to show that he ever intended to sell any of the liquor.

The contention of appellant is answered by the statute (Rem. Code, § 6262-23), which provides that:

"In any prosecution for the violation of any provisions of this act, it shall be competent to prove that any person had in his possession more than two quarts of intoxicating liquors . . . and such possession and the proof thereof, shall be *prima facie* evidence that said liquor was so held and kept for the purposes of unlawful sale or disposition."

Under the statute, when the state proved possession by appellant of twenty-three quarts of whiskey, that proof made a *prima facie* case for the jury. *State v. Bachtold,* 106 Wash. 550, 180 Pac. 896.

As we said in *State v. Gray,* 98 Wash. 279, 167 Pac. 951:

"The statutory presumption is an evidential presumption expressly made sufficient in itself *prima facie* to overcome the presumption of innocence; else the statute has no meaning at all."

Appellant admitted that the twenty-three quarts were all that remained of thirty-six quarts purchased by him in January or February, 1918, from a man he had never seen before. He also admitted enjoying

the liquor with guests in his apartments, but denied selling of same to any one. It was for the jury to say whether the testimony on the part of appellant was true, so as to overcome the *prima facie* case. It must be assumed that the jury took into consideration the demeanor and manner of the witness and all the circumstances under which he testified, and it was their privilege to believe or disbelieve the testimony offered in defense to the charge.

The instruction to the jury that no conviction should be had even if they found that appellant did have an illegal quantity of liquor in his possession, if they also found that he intended to drink the liquor himself or intended to give it to his guests in his private apartment to be drunk while there, and if the apartment was not a place of public resort, was favorable to the appellant. It is manifest that the jury concluded by their verdict that the testimony of the witness was untrue.

A careful examination of the record convincing us that there was sufficient evidence to raise a question of fact upon which the jury should pass, and that the appellant had a fair and impartial trial, the judgment appealed from is affirmed.

MOUNT, PARKER, BRIDGES, and FULLERTON, JJ., concur.

[No. 15265. Department Two. July 14, 1919.]

R. D. SIMPSON, *as Trustee etc., et al., Respondents,* v. EUGENE T. COMBES *et al., Appellants.*[1]

BANKRUPTCY (18)—ACTIONS BY TRUSTEE—RIGHT TO SUE. A trustee in bankruptcy may maintain an action to set aside a foreclosure and sale of the bankrupt's property, made prior to the filing of petition in bankruptcy, where the same was in fraud of the bankrupt's creditors, although the bankrupt did not oppose the sale.

CHATTEL MORTGAGES (48-3, 49)—POSSESSION OF PROPERTY AND DISPOSITION OF PROCEEDS. A mortgage of a stock of goods is valid, although it leaves the mortgagor in possession with power to sell in the course of trade under an agreement to apply a portion of receipts to a discharge of the mortgage indebtedness.

BANKRUPTCY (7) — FRAUDULENT TRANSFERS — EVIDENCE — SUFFICIENCY. The evidence does not sustain findings of conspiracy and fraud by chattel mortgagees to the detriment of the bankrupt mortgagor's creditors, where it merely appears that they did not enforce payment according to the terms of the mortgage, and extended the time of maturity.

CHATTEL MORTGAGES (69, 72)—PAYMENT—DEFENSES—BURDEN OF PROOF. A chattel mortgage on a stock of goods having provided that monthly payments should be applied to the discharge of the mortgage indebtedness, the burden of proof of an oral agreement that the same might be applied on rent due from the mortgagor to the mortgagee is upon the mortgagee.

SAME (69, 72) — PAYMENT — APPLICATION — RIGHTS OF PARTIES. A chattel mortgage on a stock of goods having provided that monthly payments should be applied to the discharge of the mortgage indebtedness, and there being no oral agreement that they be applied on rent due from the mortgagor to the mortgagee, the mortgagee had no right to so apply them.

BANKRUPTCY (6, 7)—FRAUDULENT TRANSFERS—RIGHTS OF TRUSTEE. Where payments made were sufficient to discharge the bankrupt's chattel mortgage, a foreclosure sale thereunder is unlawful and void as to the trustee in bankruptcy and creditors of the mortgagor.

SAME (7, 18)—ACTIONS BY TRUSTEE—JUDGMENT—SURPLUS. Chattel mortgagees having unlawfully foreclosed the mortgage and disposed of the property of the bankrupt mortgagor, cannot object to judgment in favor of the trustee in bankruptcy for the value of the

[1]Reported in 182 Pac. 566.

property, on the ground that it exceeds the amount necessary to pay all claims, where the judgment provides that any surplus left after discharge of all obligations should be paid over to them.

Appeal from a judgment of the superior court for Pacific county, Hewen, J., entered September 11, 1918, upon findings in favor of the plaintiff, in an action to set aside a chattel mortgage and sale as in fraud of creditors of a bankrupt, tried to the court. Affirmed.

John I. O'Phelan and *Fred M. Bond*, for appellants.

Harold B. Swasey and *Geo. T. Swasey*, for respondent.

Bridges, J. — On April 28, 1914, the appellants, Eugene T. Combes and his wife, were the owners of a stock of general merchandise located in the city of Raymond, Washington. They were also the owners of the building in which this store was conducted. On that date they sold this stock of goods and certain fixtures to one C. B. Bagnall, whom we shall hereafter designate as the mortgagor, for the consideration of $10,228. All of the purchase price was paid at the time of the sale except $6,128. On the same date, Bagnall gave to the appellants a chattel mortgage covering the stock of goods and fixtures which he had purchased, for the purpose of securing the payment of the balance of the purchase price. This mortgage provided, among other things, that the indebtedness should become due on the 28th day of July, 1915; that all subsequent purchases becoming part of the merchandise of the store should be covered by the mortgage, and that the mortgagor was to remain in possession and run the store in the usual course of business. The mortgage further provided that the mortgagor "will honestly and accurately account to the first party (the mortgagee) for all sales made of said

merchandise, and pay and deliver to said first party each and every Monday hereafter a sum of money equal to two-thirds of the gross receipts during the preceding week," until the mortgage indebtedness and interest should be fully paid. These payments, as made, were to be credited on the mortgage indebtedness.

At the time of the execution and delivery of the mortgage, and as a part of the same transaction, the appellants made to the mortgagor a lease of the property in which the store business was to be carried on; this lease was to run for a period of years, and provided for a monthly rental of $65, payable in advance.

Thereafter the mortgagor continued to run the store, bought and sold goods, and contracted various bills of indebtedness. From time to time until the foreclosure of the mortgage, as hereinafter stated, the mortgagor paid to the appellants, either by check or cash, sums of money which were part, but not all, of the two-thirds of the gross receipts provided for in the mortgage. The appellants, upon receiving these payments, applied them first to the payment of the interest on the mortgage indebtedness, then to the payment of any rent which might be due, and any balance was applied on the principal of the mortgage indebtedness. Thereafter, during the month of February, 1917, the appellants claiming that there was still due on the mortgage indebtedness a considerable sum of money, and after demanding the payment thereof, foreclosed their mortgage by notice and sale as provided by statute. At the sheriff's sale the appellants were the purchasers of all of the stock of goods covered by the mortgage, and at once took possession and shortly thereafter disposed of all the property purchased. The mortgagor and his attorney

knew of the foreclosure proceedings and were present at the sale. They did not undertake to carry the proceedings into the superior court, nor in any way contest the same, nor did they raise any objection to the foreclosure and sale.

Shortly thereafter the mortgagor filed a petition in bankruptcy, and some time after that he was duly adjudged a bankrupt. The plaintiff in this case was the duly appointed trustee in bankruptcy and had charge of the bankrupt's estate. The estate was found to have practically no assets.

The trustee brought this suit for the purpose of setting aside the foreclosure and sale and to recover the property involved or the value thereof. The grounds of this suit were, among others, that the mortgage was void on its face, that there had been active fraud and conspiracy between the mortgagor and mortgagees adverse to the interest of the trustee and the mortgagor's creditors, and that the mortgage indebtedness had been fully paid before the foreclosure and sale. The case was tried by the court without a jury, and a money judgment was rendered against the appellants in the sum of $3,500. This appeal is from that judgment.

There are a great many assignments of error, but they will fall under four or five heads and will be so discussed.

I. It is contended by the appellants that the trustee in bankruptcy had no authority to institute and maintain this suit because, at the time of the filing of the petition in bankruptcy and the appointment of the trustee, the mortgage had been foreclosed, the sale made, and the mortgagor had lost all interest in the property. This contention cannot be sustained. If the trustee represented only the interest of the mortgagor or bankrupt and the latter be considered as

estopped by his conduct and actions, then the contention of the appellants might be good; but it must be remembered that the trustee represented the bankrupt's estate, including all of the interest of his creditors. This was, in substance, a suit to recover property wrongfully or fraudulently disposed of, and it has always been held that a trustee in bankruptcy, or a receiver in insolvency, may at any time maintain such an action. To sustain the contention of the appellants in this regard would be to hold that a trustee in bankruptcy could not maintain a suit to recover property which had been fraudulently disposed of in violation of the rights of creditors. It would seem that an extended argument need not be made to show that this position is untenable.

II. It is contended by the respondent, but we believe, without much earnestness, that the mortgage is void on its face. We cannot so hold. This mortgage was duly executed and filed with the county auditor as provided by law. Mortgages of this character have been upheld by this court in many decisions, running over a period of more than twenty years. *Ephraim v. Kelleher,* 4 Wash. 243, 29 Pac. 985, 18 L. R. A. 604; *Van Winkle v. Mitchum,* 66 Wash. 296, 119 Pac. 748; *Nason & Co. v. Stack,* 81 Wash. 147, 142 Pac. 477; *Keyes v. Sabin,* 101 Wash. 618, 172 Pac. 835. It is unnecessary to cite more of the decisions of this court on the question.

III. The respondent has contended that the testimony shows a conspiracy on the part of the mortgagor and mortgagees to defeat the rights of the creditors, and that the conduct of the mortgagee himself was such as to be in violation of the rights of the creditors and active fraud against him.

The trial court seems to have made a finding upholding this contention. We have very carefully read

the testimony and confess that we are wholly unable to find anything in the record which would even tend to show any conspiracy or any active fraud on the part of the mortgagees. It is true that appellants did not receive the whole of the two-thirds of the receipts from sales as provided in the mortgage, and it may be that they knew they were not receiving the whole of this money, but it is plain from the testimony that the mortgagor was paying them from time to time all he could pay and all that the business would justify. The appellants, from time to time, insisted that the mortgagor should pay them larger and additional sums. There is nothing we can find in the record to show that there was any agreement between the mortgagor and mortgagees that less payments should be made than those provided for in the mortgage.

It is also true that the mortgagees did not undertake to foreclose their mortgage when it became due, but allowed the mortgagor to continue the operation of the store for sometime thereafter; but there is nothing in the testimony to indicate that by this action there was any intention to injure the mortgagor's creditors. On the contrary, it would appear that the action of the mortgagees in this regard would be to the benefit of the creditors rather than to their detriment.

The business seems to have been carried on in the usual course and as men are in the habit of dealing under like circumstances. We think, therefore, that the trial court was in error in finding actual or active fraud or any conspiracy against the rights of the trustee or the creditors; but, as we shall later see, this erroneous finding becomes immaterial.

IV. The respondent has at all times contended that, at the time of the foreclosure and sale, the whole of the mortgage indebtedness had been paid, and that

for this reason the foreclosure and sale were wrongfully made and in violation of the rights of the trustee and the creditors of the bankrupt.

It is hardly necessary to do more than to state the general rule that the debtor, upon making payments to his creditor, may designate the application of those payments, and that if he fails to so designate, the creditor may apply the payments as he may see fit. There are some exceptions to this general rule, but we are not interested in them in this case.

We have before stated that some $2,000 of the money paid by the mortgagor to the appellants was applied by the latter towards the payment of the rent under the lease. If these payments had all been applied to the discharge of the mortgage indebtedness, then, at the time of the foreclosure and sale, the whole of that indebtedness would have been paid. The important question, therefore, arises as to whether or not the appellants had the right to apply any of the payments made by the mortgagor to the discharge of the rental indebtedness. The appellant Combes testified that, at the time of the making of the mortgage, there was an oral understanding that he might apply payments to the discharge of the rent, and that subsequently and at various times there were like agreements and understandings between the parties to the mortgage. On the other hand, the mortgagor stoutly denies that there ever was any such oral agreement or that he ever authorized the mortgagees to apply the payments towards the rental indebtedness, and that there never was any agreement with reference to the application of the money paid other than that contained in the mortgage itself. The trial court made a finding to the effect that no oral agreement had ever been made concerning the application of these funds. We have very carefully read the testi-

mony and, while the same is in great conflict, we are disposed to adopt the finding of the trial court. He had the witnesses before him and was probably in a better position to reconcile this contradictory evidence than we.

The appellants contend, however, that, inasmuch as the mortgagor did not put in his petition in bankruptcy any item showing the indebtedness for rent, the court, on this account, should find that there was an oral agreement for the application of the funds. It does not appear to us that this argument can have very much weight. The testimony shows that the mortgagor's books did not contain any item of indebtedness on account of rent. These petitions in bankruptcy are generally made out by some third person or an attorney for the bankrupt, and the failure to show in the bankruptcy petition the rental indebtedness would have very little meaning. But it is further contended that the mortgagor and his attorney were present at the foreclosure sale and did not then raise any objections or contend that there was nothing owing on the secured indebtedness. The mortgagor, however, satisfactorily explains this by testifying that, at the time of the sale, he had not figured up accurately the amount he owed appellant, and while he felt quite certain he owed nothing, or very little, on the mortgage indebtedness, yet he did know that he owed him a large sum on account of rent, and that, in any event, he was bankrupt and did not have any money to protect his rights or contest the sale.

The mortgage itself having provided that these payments should be applied to the discharge of the mortgage indebtedness, the burden of proving any oral agreement to the contrary would rest upon the appellants, and they have failed to sustain the burden. The

testimony amply justifies the finding of the lower court with reference to this matter.

This being the condition, the result is that the only agreement concerning the application of the funds is that contained in the mortgage itself, to the effect that such payments should be made on, and be applied to, the payment of the mortgage indebtedness, and it was therefore the duty of the appellants to have so applied the payments. If they had so done, there would not have been any money owing on that indebtedness at the time of the foreclosure sale. The result necessarily is that the sale was unlawful and void and in violation of the rights of the trustee and the creditors whom he represents.

The respondent has contended here that, even though there had been an agreement between the parties to the mortgage that the money to be paid might be applied in part to the payment of the rent, such agreement would be void and in violation of the rights of the creditors, because of the provision in the mortgage that such sums should go toward the discharge of the mortgage indebtedness. On the contrary, the appellants contend that, inasmuch as the payment of the rent was a part of the operating expenses of the business, the parties had the right to agree that part of the payments provided by the mortgage to be made might be diverted to the payment of that rent. Having come to the conclusion that the sale was void for other reasons, we find it unnecessary to decide this very interesting question.

V. The appellants further assert that the judgment should be reversed because the claims presented to the trustees aggregate in the neighborhood of $1,500, and that the year provided by the Federal bankruptcy act for the presentation of claims had expired, and that

the judgment, if any, against the appellants should have been only for an amount sufficient to pay the claims so presented. It must be remembered, however, that many unexpected contingencies may arise in these bankruptcy matters which would incur additional expense. It was, of course, impossible at the time of the trial for the trustee to have shown, with any accuracy, the expenses the bankrupt's estate would be put to. It was impossible for him at that time to know what litigation there might be, what necessity for the payment of costs and expenses and attorney's fees; it was impossible for him to know at that time that he would be required to follow this case to this court at very considerable expense. It may turn out that the amount of the judgment will not be more than enough to pay the claims and the expense of administering the estate. In any event, the appellants, having unlawfully foreclosed the mortgage and disposed of the property so that it cannot be turned over to the trustees, cannot now be heard to complain that they are required to pay to the trustee the value of the property. They cannot thus take advantage of their own wrong. Besides this, the trial court's judgment fully protects them by providing that if there is any surplus left after the trustee had discharged the obligations of the bankrupt's estate, such surplus should be paid over to them.

The appellants further contend that the evidence fails to show that the property involved was of the value of $3,500, being the amount of the judgment against them. We are not disposed to interfere with the findings of the trial court in this regard. We think the testimony amply sufficient to have justified the lower court in finding the value to be that sum.

There are one or two other minor questions briefly

argued by the appellants, but in which we find no merit.

Judgment affirmed.

HOLCOMB, C. J., PARKER, MOUNT, and FULLERTON, JJ., concur.

[No. 15276. Department One. July 14, 1919.]

JACOB ZITTEL *et al., Respondents,* v. EDWARD F. MEYER *et al., Appellants.*[1]

FRAUDS, STATUTE OF (20)—REAL PROPERTY—CREATION OF INTERESTS—TRUSTS—AGENCY. The fraud of an agent, orally employed to purchase real estate for his principal, cannot be avoided by the plea that his agency was not evidenced in writing and that the statute of frauds prevents the impressing of a trust upon the real property in his hands.

Appeal from a judgment of the superior court for Grant county, Hill, J., entered November 12, 1918, upon findings in favor of the plaintiffs, in consolidated actions for equitable relief, tried to the court. Affirmed.

J. P. Ball and *Wm. T. C. Ball,* for appellants.

Daniel T. Cross and *Jones & Riddell,* for respondents.

MACKINTOSH, J.—The respondents, Zittel and Holzkamp, and appellant Meyer, by an oral agreement, purchased lands in Grant county for their joint account. The respondents were to furnish the money to make the initial payments and take title to the property, and Meyer was, within one year thereafter, to pay to them the portion of the purchase price corresponding to such interest as he might desire in the lands. Meyer was to negotiate the purchase of the

[1]Reported in 182 Pac. 585.

property, and under this agreement various tracts were acquired. Through sundry and divers manipulations, Meyer had transferred to respondents a portion of the property and retained title to a portion in himself. It is unnecessary to follow the tortuous trails that Meyer pursued; it is sufficient to say that they resulted in securing 440 acres of property, the real purchase price of which was $7,400, but which cost the respondents $6,250 in cash, of which Meyer retained $2,250 for himself, and, in addition, a note of one of the respondents in the sum of $200, and mortgages aggregating $9,850 upon the three hundred acres of land which were transferred to the respondents, and mortgages for $3,400, being the balance of the purchase price. In other words, the venture as it now stands shows the respondents to have invested $6,250 in cash, to owe $10,050 to Meyer and $3,400 to the original owners of the property, and they have title to 300 acres, Meyer has title to 140 acres, and has $2,250 in cash, and has owing him by the respondents $10,050.

Two actions were begun by the respondents to clear up this situation, and two actions were also begun by the holders of mortgages given to Meyer's representatives for the purpose of foreclosure. These various actions were consolidated and are here as one.

The contention of the appellants is that all the arrangements between the parties having been oral, the statute of frauds prevents the impressing of any trust upon the property in the hands of Meyer or his dummy representatives. In *Stewart v. Preston*, 77 Wash. 559, 137 Pac. 993, we committed ourselves to the salutary rule that the fraud of an agent who was orally employed to purchase real estate for his principal may not be avoided by the plea that his agency was not evidenced in writing.

The court prepared and signed voluminous findings and conclusions based upon what is the great preponderance of the evidence, and has made straight the crooked places in these transactions as nearly as is possible under all the circumstances, and we are satisfied that these findings and conclusions and the decree based thereon are correct, and they are hereby adopted and affirmed.

HOLCOMB, C. J., MAIN, TOLMAN, and MITCHELL, JJ., concur.

[No. 15273. Department Two. July 21, 1919.]

CHINOOK LUMBER & SHINGLE COMPANY, *Appellant*, v. McLANE LUMBER & SHINGLE COMPANY, *Respondent*.[1]

SALES (10, 12)—OFFER AND ACCEPTANCE—CERTAINTY—CONTRACTS BY CORRESPONDENCE. Where the seller answered an inquiry of buyer wanting star shingles at $2 per thousand, by saying that it had sold out all its star shingles, but "quote two fifteen additional business," the expression is too uncertain to be the basis for a binding contract.

SAME (10, 12)—Where the seller answered an inquiry of buyer wanting five car loads of star shingles at $2 per thousand by saying that it had sold out all its star shingles, but "quote two fifteen additional business," to which the buyer replied asking seller to book it for five cars at $2.15 per thousand, and "advise by return wire how soon can ship," to which no reply was made, there was no agreement as to the number of cars or time or place of shipment, and no closed contract.

Appeal from a judgment of the superior court for Cowlitz county, Darch, J., entered October 7, 1918, upon sustaining a demurrer to the complaint, dismissing an action on contract. Affirmed.

Alexander & Bundy, for appellant.

O'Neil, Spaulding & Stuart, for respondent.

[1]Reported in 182 Pac. 625.

Bridges, J. — This was an action for damages for breach of an alleged contract for the sale of five cars of shingles. The action is based entirely on certain telegrams and letters passing between the appellant and respondent, which are as follows:

"November 5, 1917.

"The McLane Lumber & Shingle Co.,
"Kelso, Washington.

"Trying get you by telephone but no success. Want one to five cars Stars at two dollars including large car three hundred or more two such go sixty seven and half cent rate and seventy one and half cent respectively. Advise return wire what can handle all for southwest. Chinook Lumber & Shingle Co."

"Kelso, Wash., Nov. 5, 1917.

"Chinook Lumber & Shingle Co.,
"Seattle, Wash.

"Stars all sold out. Quote two fifteen additional business. McLane Lumber & Shingle Co."

"Nov. 6, 1917.

"McLane Lumber & Shingle Co.,
"Kelso, Washington.

"Your wire fifth. Book us five cars stars two fifteen. Advise return wire how soon can ship. Prefer quick and via N. P. Laurel, but can use part GN Whitefish or O. W. Cheyenne. Medium cars or average. Advise price and quantity standards straight cars or with stars.

"Chinook Lumber & Shingle Co."

"Nov. 14, 1917.

"McLane Lumber & Shingle Co.,
"Kelso, Washington.

"Gentlemen: We have not yet received your acknowledgment of our wire order of November 6th., in response to your wire of November 5, although in sending you the order we asked that you advise us by return wire how soon you could ship; also asked for prices on Standards, straight cars or mixed with Stars.

"We have since made disposition of our order for Standards, although if you have some in stock that

you wish to load out, can probably take care of them for you. What we are most anxious for, however, is the five cars of Stars. If not already shipped, please advise by return mail when we may expect them. Thanking you, we are,

"Respectfully yours,
"Chinook Lumber & Shingle Company,
"Per W. E. Howard."

"Nov. 15, 1917.

"Chinook Lumber Company,

"Gentlemen:—Inasmuch as your wire order of Nov. 6th. required confirmation by wire, which we did not do, we have considered the matter closed and did not enter your order. Yours faithfully,

"McLane Lumber & Shingle Company,
"Per Myers."

These telegrams and letters were made a part of the complaint.

The respondent interposed a general demurrer to the complaint, which was sustained by the trial court, and upon appellant refusing to plead further, judgment was entered dismissing the action. This appeal is from that judgment.

It is an elementary rule that a binding contract of sale must be reasonably certain in its terms; that it must be such that the court can ascertain therefrom the intention of the parties; that the thing sold must be described with reasonable certainty and the price be fixed; that there must be an offer and unconditional acceptance, and that the minds of the parties must have met in the agreement.

It is contended by the appellant that the words "quote two fifteen additional business," contained in the telegram of respondent, was an offer on the part of respondent to sell to appellant Star shingles at the price of $2.15 per thousand. It is the contention of respondent that the words above quoted amount to nothing more than a quotation of prices.

The briefs cite many cases concerning the meaning the word "quote" when used in letters and telegrams such as we are considering. Cases may be found holding that the word means "offer to sell," while other cases hold the word to be used in its common meaning, that is, to state the price of a thing. In order to arrive at the true meaning of the word, it is always necessary to take into consideration the circumstances surrounding its use. General rules of construction cannot be more than general guides. Each case must, after all, stand upon its own feet.

It seems to us that the respondent's telegram of November 5, under any meaning of the word "quote," is entirely too uncertain upon which to base a binding contract. The appellant had wired respondent advising the latter that it wished to buy from one to five cars of Star shingles at $2 per thousand. The respondent answered by saying that it had sold out all of its Star shingles, but "quote two fifteen additional business." This expression "quote two fifteen additional business" may easily mean many different and inconsistent things. It might, for illustration, mean what the appellant contends for, that is, that "we will sell you Star shingles hereafter to be manufactured by us at $2.15 per thousand," or "we have no Star shingles but will sell you any other class of shingles at $2.15 per thousand," or "we have no Star shingles but expect to manufacture some soon and we invite your further negotiations at our price of $2.15 per thousand," or "our price for future deliveries of Star shingles will be $2.15 per thousand." We do not see how it is possible for the court to say what respondent had in mind. This court, in a number of cases, has held that a contract must be certain in its terms.

In the case of *Ryan v. Hanna,* 89 Wash. 379, 154 Pac. 436, the court said:

"Many other like deficiencies suggest themselves, rendering this contract too uncertain to be enforced. The court can supply some elements in a contract, but we cannot make one; and when the language in a contract is too uncertain to gather from it what the parties intended, the courts cannot enforce it."

In the case of *Weldon v. Degan,* 86 Wash. 442, 150 Pac. 1184, the court said:

"It seems to us that the agreement is not sufficiently definite in its terms to be binding upon any one of the parties to the extent that they could be called upon to pay damages to the other parties, either actual or litigated."

In 6 R. C. L., page 644, it is said:

"The contract must be certain and unequivocal in its essential terms either within itself or by reference to some other agreement or matter. In addition to a definite promise, the subject-matter of the agreement must be expressed in such terms that it can be ascertained with reasonable certainty. A contract which is so uncertain in respect to its subject-matter that it neither identifies the thing by describing it, nor furnishes any data by which certainty of identification can be obtained, is unenforcible."

These telegrams are not sufficiently certain upon which to base a contract.

If, however, it should be considered that this expression "quote two fifteen additional business" is subject to construction, we are of the opinion that the more reasonable meaning to be given it would be that the respondent used the word "quote" in its common meaning and not as meaning that it agreed to sell; that it meant to state that it had no Star shingles for sale but that it would have some for a future delivery, and invites the appellant to further conference with

reference thereto. When appellant made an offer for Star shingles and respondent replied that it had no such shingles, the negotiations based upon appellant's proposition were at an end. By giving prices on "additional business" respondent probably meant to open new negotiations involving some other deal. He did not state what the "additional business" was to be, nor the amount thereof, or when to be performed. These things were evidently left to be later agreed upon.

The case of *Nebraska Seed Co. v. Harsh,* 98 Neb. 89, 152 N. W. 310, L. R. A. 1915F 824, is one very similar to the case at bar. There the appellant wrote respondent as follows: "I have about 1800 bu. or thereabouts of millet seed, of which I am mailing you a sample. This millet is recleaned and was grown on sod and is good seed. I want $2.25 per cwt. for this seed f. o. b. Lowell." The respondent answered as follows: "Sample and letter received. Accept your offer. Millet like sample two twenty-five per hundred. Wire how soon can load." In a suit based upon these two communications the appellant claimed damages of the respondent for failure to perform the contract. The court said:

"In our opinion the letter of defendant cannot be fairly construed into an offer to sell to the plaintiff . . . The letter as a whole shows that it was not intended as a final proposition, but as a request for bids. It did not fix a time for delivery, and this seems to have been regarded as one of the essentials by the plaintiff, for in his telegram he requests defendant to 'wire how soon can load.' "

The following cases are very similar to the one at bar and, it seems to us, are controlling in principle: *Beaupre v. Pacific & Atlantic Telegraph Co.,* 21 Minn. 155; *Moulton v. Kershaw,* 59 Wis. 316, 18 N. W. 172,

48 Am. Rep. 516; *Allen v. Kirwan,* 159 Pa. St. 612, 28 Atl. 495; *Lincoln v. Erie Preserving Co.,* 132 Mass. 129; *Topliff v. McKendree,* 88 Mich. 148, 50 N. W. 109.

If, however, these telegrams should be construed as contended for by appellant, that respondent agreed to sell shingles to it and it agreed to purchase at a fixed price, yet there is no completed contract between the parties because there is no agreement of the amount of shingles to be sold. As so construed these telegrams would mean about as follows: Appellant wires that it wants to buy from one to five cars of Star shingles at $2 per thousand. The respondent answers to the effect that it has sold all of its Star shingles, but is willing to sell to appellant Star shingles hereafter to be manufactured at $2.15 per thousand; to which appellant wired, asking respondent to book it for five cars Star shingles at $2.15 per thousand. Certainly appellant is not entitled to a more favorable construction of these telegrams than is here given. Under this construction the appellant has unquestionably agreed to buy five cars of shingles, but there is a complete absence of agreement on the part of respondent to sell five or any number of cars. Nor is there anything in the telegrams whereby the implication can be found that respondent was willing to sell any specified number of cars. It is elementary that there cannot be a binding contract till the minds of the parties have met on the amount of the product sold. This is as important as to fix the price to be paid.

But it is clear to us that neither of these parties considered at the time that there was a binding, completed contract. The failure to agree as to the number of cars to be sold and as to the time and place of delivery, together with the subsequent correspondence, show that the parties expected there would be further negotiations between them. In construing contracts

the court will always take into consideration the construction thereof given by the parties themselves. In its telegram of November 6, asking respondent to book it for five cars Star shingles, appellant further said "advise return wire how soon can ship. Prefer quick. . . . Medium cars or average. . . ." On the 14th of November, appellant wrote respondent saying: "We have not yet received your acknowledgment of our wire order of November 6 . . . If not already shipped, please advise us by return mail when we may expect them." On November 15, respondent answered appellant's letter by saying: "Inasmuch as your wire order of November 6 required confirmation by wire, which we did not do, we have considered the matter closed and did not enter your order." This correspondence is wholly inconsistent with the idea of a closed contract.

Judgment affirmed.

Holcomb, C. J., Fullerton, Parker, and Mount, JJ., concur.

[No. 15285. Department Two. July 21, 1919.]

CHARLES A. ANDERSON, *Appellant*, v. RUCKER BROTHERS, *Respondent*.[1]

PLEADING (190)—VARIANCE—ITEMS OF DAMAGE. Where a complaint for overflowing farm lands specifically alleges with great particularity the various items of damages claimed, it is not error to exclude evidence of damage by the deposit of sand and gravel on the land, to which the complaint made no reference, in the absence of a request for leave to amend.

WATERS AND WATER COURSES (72-74)—FLOWAGE—DEGREE OF CARE. One who impounds the waters of a stream is required to exercise such reasonable care and caution in the construction, maintenance and operation of the dam as a reasonable, careful, and prudent man acquainted with the nature and habits of the stream would exercise under like circumstances, not only as to ordinary conditions but as to such unusual and extraordinary floods as such a careful man would reasonably expect; but he is not an insurer or liable for acts of God or floods that would not be anticipated by a reasonably prudent man.

SAME (74)—FLOWAGE—INSTRUCTIONS. In an action for overflowing farm lands by the negligent construction of a dam that gave way, instructions which as a whole required that defendant's dam must be sufficient to withstand all such freshets and floods as an ordinarily prudent person, having knowledge of the conditions, would expect to occur, are as favorable to plaintiff as he could ask.

SAME (74). Such instructions are sufficient notwithstanding a somewhat unfortunate use of words in referring to "unusually high freshets" which would not have been reasonably expected, where it was plain that unprecedently high freshets was meant; and notwithstanding they were subject to some criticism in not more fully expressing that the reasonably prudent person mentioned should be one who knew the country and the nature and habits of the stream; especially in the absence of any request for amplification of any indication that the jury was misled.

SAME (74). In such a case, the instructions are not objectionable in that they refer to such care as an ordinarily prudent man would exercise in like conditions "when the risk is his own;" since the expression did not refer to such care as would be exercised if the land were his own, but if the risk of being held in damages were his own.

[1]Reported in 183 Pac. 70; 186 Pac. 293.

Appeal from a judgment of the superior court for Snohomish county, Pemberton, J., entered September 27, 1917, upon the verdict of a jury rendered in favor of the defendant, in an action in tort. Affirmed.

Hathaway, Beebe & Hathaway and *J. Y. Kennedy*, for appellant.

Coleman & Fogarty and *W. P. Bell*, for respondent.

Peters & Powell, amici curiae.

Walter F. Meier and *Frank S. Griffith, amici curiae.*

Bridges, J.—Suit for damages caused by overflow. The respondent was engaged in the logging and lumbering business. To assist it in its operations, a number of years prior to March, 1916, it built a dam near its works for the purpose of creating a backwater pond. In order to do this it dug a ditch from Lake Hanson creek to Worthy creek, in Snohomish county, and dug another ditch from Worthy creek to its dam. The purpose of these ditches was to divert a part or all of the water of these two creeks to its dam for the purpose of creating the pond. The pond thus created covered from five to fifteen acres of land, and was from three to six feet in depth. The appellant owned a farm about three-quarters of a mile below the respondent's pond. The complaint alleged that, during the month of March, 1916, through the carelessness and negligence of the respondent in constructing the dam, and in failing to properly maintain and keep the same in repair, and because it had become old and insufficient, the dam and the gates thereof gave way and released large quantities of water stored thereby, which waters were flooded over the appellant's land, causing damage thereto for which he sought recovery. The case was tried by a jury, which returned a verdict in favor of respondent. Judgment

was entered on this verdict, and the appeal is from that judgment.

I. At the trial the appellant offered evidence tending to prove that the flood waters caused by the breaking of the dam had deposited on the appellant's land sand and gravel. The trial court sustained objections to this testimony on the ground that it was not within the pleadings. The complaint very particularly mentioned the features of damage. It alleged that,

"The top soil of plaintiff's premises was eroded and washed out, to the plaintiff's damage in the sum of nine hundred and sixty dollars ($960); a certain creek running through the plaintiff's premises was filled up with stumps and other debris, for a distance of about 160 rods, to the plaintiff's damage in the sum of three hundred and fifty dollars ($350); two bridges were washed out, to the plaintiffs damage in the sum of twenty-five dollars ($25); ten rods of puncheon were washed out, to the plaintiff's damage in the sum of twenty-five dollars ($25), together with about one hundred feet of fence, to the plaintiff's damage in the sum of twenty dollars ($20)."

It will thus be seen that, although the complaint very specifically alleges the various items of damage, it wholly fails to refer to any deposit of sand or gravel on the land. A bill of particulars could not have more definitely given the various items for which recovery was sought, and where there is a bill of particulars, proof will be restricted to the matters therein set out. *Powers v. Washington Portland Cement Co.*, 79 Wash. 1, 139 Pac. 615. In the case of *Eckhart v. Peterson*, 94 Wash. 379, 162 Pac. 551, this court held that, where the complaint sets out the specific items of damage, the plaintiff will not be permitted, over objection, to prove other items. *Horton v. Seattle*, 53 Wash. 316, 101 Pac. 1091.

If the appellant had asked to have his complaint amended so as to include this item of damage it would have been the duty of the court to have granted the permission, unless it appeared that the respondent would have been misled, taken by surprise, or injured thereby. But appellant did not ask the amendment. Clearly, the offered proof was not within the pleadings, and the court did not err in its ruling.

II. The appellant next complains of certain instructions given by the court to the jury on the duty of respondent in the construction and maintenance of the dam. The instructions complained of, the wording of which we will presently notice, the appellant claims did not impose upon the respondent a proper or sufficiently high degree of care.

A few of the earlier cases seem to have held that one creating a pond of water by means of a dam does so at his own peril, and can defend against a claim for damages because of flooding, only on the ground that the damage was caused by an act of God. *Fletcher v. Rylands,* L. R., 1 Exch. 265; *Defiance Water Co. v. Olinger,* 54 Ohio St. 532, 44 N. E. 238, 32 L. R. A. 736. But the more recent and, unquestionably, the greater weight of authority holds to a less strict and, we believe, a much more just rule of liability, and one which, while properly protecting the rights of others, encourages business development. That rule is that one who, by means of a dam, impounds the water of a stream is required to exercise such reasonable care and caution in the construction, maintenance and operation of the dam as a reasonably careful and prudent man who was acquainted with the nature and habits of the stream, the features of the surrounding country, the snow and rainfalls, and other conditions likely to cause freshets, would exercise under like circumstances. This rule would cover the stream not

only in its ordinary and usual condition as to water, but also when in such unusual and extraordinary flood and freshets as such careful and prudent man would reasonably expect; but the dam owner would not be negligent in failing to provide against unprecedented floods or freshets or act of God. *Maplewood Farm Co. v. Seattle,* 88 Wash. 634, 153 Pac. 1061; *Dahlgren v. Chicago, Milwaukee & St. Paul R. Co.,* 85 Wash. 395, 148 Pac. 567; *Kuhnis v. Lewis River Boom & Logging Co.,* 51 Wash. 196, 98 Pac. 655; 40 Cyc. 683; 13 Am. & Eng. Ency. Law (2d ed.), 688; 3 Farnham, Waters, p. 2798; *Columbus & W. R. Co. v. Bridges,* 86 Ala. 448, 5 South. 864, 11 Am. St. 58; *Todd v. Cochell,* 17 Cal. 98.

Let us see if the court's instructions, taken as a whole, will measure up to these requirements.

In its instruction number five, the court instructed the jury that "if the defendant used ordinary care in constructing and maintaining said dam, that it is not liable and your verdict must be for the defendant. I further instruct you that ordinary care means such care as ordinarily prudent men would exercise under like conditions when the risk is their own." The trial court's instruction number six was to the effect that the defendant would be required to use

"ordinary care, that is, that degree of care which an ordinarily prudent person would use under the same or similar circumstances, and, under this rule, the dam must be sufficient to withstand not only the usual and ordinary freshets, but must also be sufficient to withstand such extraordinary freshets as an ordinarily prudent person would reasonably expect to occur. If you find from the evidence that there was an unusually large fall of snow in January and February, 1916, and that snow melted away very rapidly in March and caused unusually high freshets, such that an ordinarily prudent person, in the construction

and maintenance of the dam in question, would not reasonably have expected to occur, and caused the damage to plaintiff, if you find there was any damage, then in that event the plaintiff cannot recover and your verdict must be for the defendant."

It has been held, time and again, that one maintaining a dam of this character is bound to use only reasonable care and prudence. The case of *Maplewood Farm Co. v. Seattle, supra,* was very similar to the case at bar. The court said:

"In the instruction defining negligence, the degree of care which the city was held to in building the superstructure was that of reasonable and ordinary care. The appellant requested an instruction which imposed on the city a higher degree of care than that of ordinary care in the construction of the superstructure. The instructions given correctly state the law."

At page 688, vol. 13, Am. & Eng. Ency. Law (2d ed.), it is said:

"That rule in relation to the present subject [floods] requires that each proprietor in exercising his own rights in his own territory shall act with reasonable skill and care to avoid injury to others, and as an approximate rule for measuring that degree it is laid down to be such skill, care, and diligence as men of common and ordinary prudence in relation to similar subjects would exercise in the conduct of their own affairs."

Wolf v. St. Louis Independent Water Co., 10 Cal. 541. See, also, to the same effect, the cases hereinabove cited.

We have no doubt that all of instruction number five and all but the last paragraph of instruction number six properly state the law. In the latter portion of instruction number six, the trial court was somewhat unfortunate in the selection of his words. He instructed the jury that, if the melting snow "caused

an unusually high freshet, such that an ordinarily prudent person, in the construction and maintenance of the dam in question, would not reasonably have expected to occur," then the plaintiff could not recover. As such reasonably prudent person must of necessity expect unusually high freshets, it is plain that the court meant and referred to unprecedentedly high or extraordinary freshets. In the earlier part of this instruction the court, in the same connection, spoke of "extraordinary" high freshets, and it is plain that, in the latter portion of the instruction, he used the expression "unusually high freshet" in the sense of "extraordinary high freshet." It may be said generally that there are three stages of freshets; the ordinary freshet, the extraordinary freshet, and the unprecedented freshet. *Avery v. Vermont Electric Co.*, 75 Vt. 235, 54 Atl. 179, 98 Am. St. 818, 59 L. R. A. 817, and especially the note at page 876 *et seq.* Such of any of these freshets or floods as from climatic and geographical conditions may reasonably be expected, whether of frequent or infrequent occurrence, must be taken into consideration in estimating hazards attending the obstructions of a water course. *Gulf Red Cedar Co. v. Walker*, 132 Ala. 553, 31 South. 374; *Ohio & M. R. Co. v. Ramey*, 139 Ill. 9, 28 N. E. 1087, 32 Am. St. 176; *Van Duzer v. Elmira, C. & N. R. Co.*, 75 Hun 487, 27 N. Y. Supp. 474; *Chicago, B. & Q. R. Co. v. Schaffer*, 26 Ill. App. 280.

Taking these instructions as a whole, it is perfectly plain that the court instructed that respondent's dam must be sufficient to withstand all such freshets or floods as an ordinarily prudent person, having knowledge of the conditions, would have expected to occur.

We think the court's instructions may be open to some criticism because they did not express more fully

the idea that the reasonably prudent person therein mentioned should be a person who knew the surrounding country, the nature and habits of the stream, the likelihood of snow and rainfall, etc. But the court in instruction five told the jury that ordinary care meant such care as an ordinarily prudent man would exercise "under like conditions," and in instruction number six the court spoke of ordinary care as meaning such care as an ordinarily prudent person would use under "the same or similar circumstances." The court unquestionably meant, and the jury must have understood, by the expression "like conditions" and "same or similar circumstances," the same thing as though the court had expressly required of such prudent person knowledge of the nature and habits of the stream, the snow and rainfall, and other surrounding circumstances and conditions. If the appellant had requested the court to amplify these instructions in this regard, it would doubtless have so done. But, taken as they were given by the court, we cannot conceive that the jury was misled. It would be absurd and against all rules of common sense for this court to reverse on all technical and minor inaccuracies found in the trial court's instructions to the jury. In the rush of trial, that court has not opportunity to mold every word of its instructions to nicety of meaning or express itself in language of exact fitness. The instruction will be sufficient if it give the law in such way as that the jury will understand and will not be misled.

III. The appellant further complains of that portion of instruction five which required the respondent to use such care as an ordinarily prudent man would exercise in like conditions "when the risk is his own." Reference is made to a quotation from *Gulf, Colorado*

& S. F. R. Co. v. Pomeroy, 67 Tex. 498, found in the case of *Kuhnis v. Lewis River Boom and Logging Co., supra.* The appellant misconstrues the meaning of the expression "when the risk is his own." The court did not mean that the respondent should exercise such care as if the land which might be damaged were his own, but, on the contrary, meant likelihood of being held in damages because of injuring the land of someone else. This distinguishes the instruction of the court below from the Texas case above mentioned.

The appellant cites the case of *Dahlgren v. Chicago, Miwaukee & St. Paul R. Co., supra,* and quotes from the syllabus of that case to the effect that the obstruction of a water course causing overflow to the lands of another is wrongful regardless of negligence, and that the instruction should eliminate the question of negligence under such circumstances. In that case the railroad company completely filled the bed of a small stream which had always drained flood waters from the plaintiff's land, and placed therein a tile opening which it was contended was of insufficient size to carry off the waters in times of freshet. The railroad company, in this court, complained that the instruction eliminated the question of negligence. On that point the court said:

"But if it be meant by this that it was necessary for the respondents to show, in addition to the fact that the construction of the embankment caused them an injury, that the work of construction was performed in a negligent manner, we cannot agree with the contention. It is doubtless true, as the appellant argues, that it had a lawful right to construct an embankment for the use of its railway, but it does not follow that it had a lawful right to construct it in such a manner as to cause injury to the property of the respondents."

There is nothing in that case contrary to what we have here said.

The appellant makes some contention that the verdict of the jury was against the weight of the evidence. We have carefully read the testimony, and while there was a very serious conflict, we cannot say that it preponderated in favor of the appellant. It was a case to go to the jury, and the jury having found against the appellant, we will not disturb the verdict. We see no reason for reversing the case.

Judgment affirmed.

Holcomb, C. J., Fullerton, Parker, and Mount, JJ., concur.

On Rehearing.

[*En Banc.* December 10, 1919.]

Bridges, J.—Upon rehearing *En Banc,* the court adheres to the disposition made of this case by its department opinion. However, inasmuch as there have been two *amici curiae* briefs filed herein since the opinion was written, and because of the importance of the questions involved, we have concluded to add something to the original opinion.

This is a case where the respondent constructed and maintained a dam for the purpose of creating a backwater pond to be used by it in its logging operations; the dam broke and the water so confined flowed over the plaintiff's lands, and this action was brought to recover alleged damages caused thereby. From a verdict and judgment in favor of the defendant, this appeal is taken. For more of the facts involved, reference is made to the former opinion.

Generally speaking, there are two chief questions involved in a case of this character; the first is, whether the dam owner must construct and maintain his dam entirely at his own peril and as an insurer against damage, or whether he will be excused from damages caused by floods which he could not reasonably have

anticipated, and if the latter be the correct doctrine, then the care required of such dam owner to anticipate freshets and flood waters; and secondly, whether, as to all floods and conditions which he is required to anticipate, he must maintain his dam at his peril and as an insurer, or will reasonable care be the measure of his duty. In our former opinion we meant to deal only with the first proposition mentioned. It was not necessary to a decision of the case that we should deal with the second proposition above mentioned, because the trial court had instructed the jury that defendant was bound to maintain his dam so that the same would withstand "not only the usual and ordinary freshets, but must also be sufficient to withstand such extraordinary freshets as an ordinarily prudent person would reasonably expect to occur." In other words, the trial court instructed the jury on the theory that the dam owner would be liable, regardless of the question of care or negligence, for damage resulting from the breaking of his dam as the result of such floods as a reasonably prudent man would be required to anticipate.

This instruction was certainly as favorable to the appellant as he could have asked, because it eliminated from the case the question of the negligence or lack of negligence of the defendant and imposed upon it the duties of an insurer.

We wish to say, however, that in the departmental opinion we did not mean to, nor do we now, either approve or condemn the instruction given by the trial court; we only hold that it was as favorable to the appellant as any view of the law would justify, and therefore he is not in position to complain.

On the first above mentioned question we intended to hold, and we now hold, that the dam builder and owner does not build and maintain the dam at his

absolute peril and is not an insurer, but that, on the contrary, he will be excused by acts of God or floods which he could not have anticipated, and that he would be required to anticipate only such floods as a reasonably prudent man, acquainted with all of the surrounding circumstances, would anticipate.

But it is said that this holding is in accordance with the doctrine of the cases of *Fletcher v. Rylands*, L. R., 1 Exch. 265, and *Defiance Water Co. v. Olinger*, 54 Ohio St. 532, 44 N. E. 238, 32 L. R. A. 736, which cases this court in its first opinion seemed to criticize. We deem it unnecessary at this time to determine what those cases actually hold; it is sufficient to say that, if our holding is in accordance with the view of those cases, then we follow them; otherwise we do not.

HOLCOMB, C. J., MOUNT, MITCHELL, PARKER, TOLMAN, FULLERTON, and MAIN, JJ., concur.

[No. 15324. Department Two. July 21, 1919.]

THE STATE OF WASHINGTON, *on the Relation of the Port of Seattle, Respondent,* v. NORMAN M. WARDALL, *as Auditor of King County, Appellant,* THOMAS S. LIPPY, *Intervener.*[1]

OFFICERS (43) — SALARY — INCREASE DURING TERM — STATUTES. Const., art. 2, § 25, and art. 11, § 8, providing that the legislature shall never grant any extra compensation to any public officer, and that the salary of any public officer shall not be increased or diminished after his election or during his term of office, applies to public officers elected for a fixed term to serve without compensation, and accordingly prohibits the granting of substantial compensation thereto after their election, and renders Laws 1917, p. 502, § 2, providing for compensation to port commissioners serving without compensation inapplicable as to commissioners theretofore elected.

MUNICIPAL CORPORATIONS (71)—OFFICERS (43)—SALARY—INCREASE DURING TERM—STATUTES. Const., art. 11, § 8, providing that the

[1]Reported in 182 Pac. 67.

salary of any county or municipal officer shall not be increased or diminished after his election or during his term of office, prohibits the granting of compensation to a port commissioner, by vote of the district pursuant to Laws 1917, p. 502, § 2, although he was elected and inducted into office subsequent to the passage of that act, where he took office prior to the district vote authorizing the salary; since the constitutional prohibition operates against the district as well as against the state.

Appeal from an order of the superior court for King county, Gilliam, J., entered February 13, 1919, granting a writ of mandate to compel the issuance of salary warrants to the commissioners of the port of Seattle. Reversed.

Fred C. Brown and *Chas. Ethelbert Claypool,* for appellant, cited: 22 Ruling Case Law, §§ 228, 229, p. 534; *State ex rel. Davis v. Clausen,* 47 Wash. 372, 91 Pac. 1089; *State ex rel. Maltbie v. Will,* 54 Wash. 453, 103 Pac. 479, 104 Pac. 797; *Butler County v. James,* 25 Ky. Law 801, 76 S. W. 402; *Folk v. St. Louis,* 250 Mo. 116, 157 S. W. 71; *Mudgett v. Liebes,* 14 Wash. 482, 45 Pac. 19.

Preston, Thorgrimson & Turner, for respondent Port of Seattle, contended, that the constitutional provision applies only to officers that were theretofore salaried officers. *State ex rel. Thurston County v. Grimes,* 7 Wash. 445, 35 Pac. 361; *State ex rel. Ross v. Clausen,* 47 Wash. 607, 92 Pac. 453; *State ex rel. Funke v. Board of Com'rs,* 48 Wash. 461, 93 Pac. 920.

The constitutional provision is only applicable to increases or decreases after a compensation had been once provided. *Harper v. Board of Com'rs of Oklahoma County,* 149 Pac. (Okl.) 1102; *State ex rel. Reardon v. Harper,* 33 Okl. 572, 123 Pac. 1038; *Commonwealth v. Carter,* 21 Ky. Law 1509, 55 S. W. 701; *Purcell v. Parks,* 82 Ill. 346; *Hurt v. Morgan County,* 166 Ky. Law 364, 179 S. W. 255; *Fox v. Lantrip,* 162 Ky.

178, 172 S. W. 133; *Rucker v. Supervisors,* 7 W. Va. 661; *Union Loan & Trust Co. v. Southern California Motor Road Co.,* 51 Fed. 840.

Peters & Powell, for intervener.

FULLERTON, J. — The legislature of the state of Washington, at its biennial session of 1911, provided for the formation of municipal corporations called port districts. Laws of 1911 p. 412; Rem. Code, § 8165-1 *et seq.* The act defined with much minuteness the powers and duties of such corporations, and provided that its powers should be exercised through a port commission consisting of three members, who, after the first election, should hold office for a term of three years. Section 5 of the act provided that such commissioners should "serve without compensation."

Pursuant to the provisions of the act, a port district was organized covering the territory comprising the county of King, called the "Port of Seattle." Commissioners were duly elected for the terms prescribed, and they and their successors in office have continually since exercised the powers of the corporation.

In 1917, the legislature passed an act amendatory of section 5 of the original act, the amendment, in so far as it is pertinent to the question here presented, being as follows:

"All port commissioners shall serve without compensation save and except in port districts having a population of two hundred thousand (200,000) or more inhabitants, and in such port districts each commissioner shall receive a compensation of three thousand dollars ($3,000) per annum, said compensation to be paid monthly out of the funds of the port district, in the same manner as are the salaries of the employees of the port district, the population of a port district to be fixed and determined by the last official census of

the United States for the purposes of this section. The foregoing provision relating to compensation of port commissioners is subject to the following proviso: The question of whether port commissioners in port districts having a population of two hundred thousand (200,000) or more inhabitants shall receive compensation as herein provided shall be submitted at the first general election after the organization of any port district having said population of two hundred thousand (200,000) or more inhabitants, or, in the case of any port district already established and having said population then at a special election of the said port district at the time of the next general county election in the county in which said port district is located, held after the taking effect of this act. There shall be printed on the ballot at such election the words 'In favor of compensation for port commissioners in the sum of three thousand dollars each per annum' and the words 'Against compensation for port commissioners in the sum of three thousand dollars each per annum.' If at such election the majority of the voters voting on said proposition shall vote in favor of such compensation, the port commissioners of such port district shall receive compensation in the sum of three thousand dollars per annum as provided herein and in any case where a port district with a population of two hundred thousand (200,000) or more inhabitants, is in existence at the time this act becomes effective and such port district votes for a compensation as hereinbefore provided, the port commissioners of such district elected and serving shall begin to receive compensation with the calendar month succeeding the month in which the vote is taken." Laws 1917, p. 502, § 2.

Acting pursuant to the amendment, the question whether the port commissioners should receive compensation as authorized therein was submitted to the electors of the district at the general election held on November 5, 1918, at which election the vote was in favor of allowing compensation. At this time the port commissioners were C. E. Remsberg, whose term of

office commenced on the second Monday in January, 1916, Robert Bridges, whose term of office commenced on the second Monday in January, 1917, and T. S. Lippy, whose term of office commenced on the second Monday in January, 1918.

At the appropriate time following the election, the port commissioners directed the county auditor of King county to draw warrants in favor of the then commissioners, in payment of the salaries allowed by the act, for the month of December, 1918, the calendar month succeeding the month in which the vote was taken. The auditor, conceiving the act inoperative as to the commissioners in office, refused to comply with the order, whereupon the port instituted proceedings in mandate in the superior court of King county to compel him so to do. On the hearing, the superior court granted a writ of mandate, and this appeal is from its order.

The auditor based his refusal to issue the warrants upon the constitution of the state. The provisions cited as directly applicable are found in § 25 of art. 2, and § 8 of art. 11, of that instrument. These read:

"Sec. 25. The legislature shall never grant any extra compensation to any public officer, agent, servant, or contractor after the services shall have been rendered or the contract entered into, nor shall the compensation of any public officer be increased or diminished during his term of office." Const., art. 2, § 25.

"Sec. 8. The legislature shall fix the compensation by salaries of all county officers, and of constables in cities having a population of five thousand and upwards, except that public administrators, surveyors, and coroners may or may not be salaried officers. The salary of any county, city, town, or municipal officers shall not be increased or diminished after his election or during his term of office, nor shall the term of any such officer be extended beyond the period for which he is elected or appointed." Const., art. 11, § 8.

Other provisions cited as indicative of the general policy of the framers of the constitution are § 25 of art. 3, which provides that the "compensation for state officers shall not be increased or diminished during the term for which they shall have been elected," and § 13 of art. 4, which provides that the salaries of the judges of the supreme and the superior courts "shall not be increased after their election, nor during the term for which they shall have been elected."

These provisions of the constitution, it may be premised, since they are prohibitory in their nature, are self-executing, binding alike upon the authority empowered to fix salaries or compensation of public officers, whether that authority be the legislature, a board or commission, or, as in this instance, the legislature with the concurrence of the electorate affected by the increase. It is plain, also, that these commissioners are public officers within the meaning of the constitutional inhibition. By the act creating port districts, such districts are made municipal corporations. The commissioners are the officers thereof, in whom is vested the authority to exercise the powers of the corporation, and they hold by fixed terms. It is further true, we think, that had the original act given the commissioners a mere nominal compensation, a substantial compensation, such as is here provided, would be an increase within the meaning of the constitutional provisions. The question for consideration is, therefore, simple in its elements. Since the commissioners are serving without compensation, is the award to them of a substantial compensation within the constitutional inhibition?

In support of the enactment, the commissioners' learned counsel call attention to the rule that courts will not declare an act of the legislature to be violative of the constitution unless it is clearly and plainly so.

and to the rule that every intendment is in favor of the constitutionality of the act, and if, after due consideration, a doubt remains as to a conflict with the constitution, the doubt is resolved in favor of the act. They then argue that it is evident that the present case presents a condition not contemplated by the framers of the constitution; that the constitution speaks of an increase and decrease in salary or compensation; that, where nothing is granted, there can be no decrease, and that to grant something where nothing was granted before is not to grant an increase within the usual meaning of that term; that we cannot speak of nothing as growing or becoming augmented; that there must first be something in order that there may be more of it; and that the thought conveyed by the term "increase" is comparative, which necessarily presupposes a positive; that is to say, it presupposes that something existed which is thereby made more, and does not presuppose the creation of something where nothing existed.

But, plausible as this reasoning may seem, we think it overlooks the purpose and intent of the constitutional inhibitions. These inhibitions, it will be observed, are wide in their application. They cover the case of every public officer holding by a fixed term, whether that officer be elected or appointed and whether his duties conduce much or little to the public welfare; a provision, said Judge Dunbar in *State ex rel. Davis v. Clausen*, 47 Wash. 372, 91 Pac. 1089,

"no doubt intended to prevent pernicious activity on the part of office holders of the state being brought to bear upon the members of the legislature—a wise provision which must not be construed out of existence or evaded by legislative enactment."

Other courts have said that such provisions also have an additional purpose, namely, to prevent the

salary-fixing body from rewarding their friends and punishing their enemies, which they were sometimes wont to do, by increasing the salaries of those in favor and decreasing the salaries of those whose actions did not meet with the approval of that body. This court has often had cause to regret that the debates of the constitutional convention have never been made accessible. These debates would certainly throw a flood of light upon the meaning of the doubtful clauses of the constitution, by making it clear why a given form of words were chosen to express an idea when another form, seemingly more appropriate, could have been employed. But the purposes of the clauses in question are not doubtful. If they do not have the suggested meaning they are wholly without purpose. Giving them this meaning, it is at once apparent that it is as much a violation of their spirit and purpose to grant a salary where none was before provided, as it is to increase an inadequate salary. In other words, it is as much against the spirit and purpose of the constitution to permit public officers to solicit a salary during their terms where none has been provided, as it is to solicit an increase of a provided salary, since the one is as much a violation of the public policy involved as is the other. We are impressed with the remarks of Mr. Justice Dickey in *Purcell v. Parks,* 82 Ill. 346. There the learned judge said:

"It seems to me it can not properly be held, that the granting of a compensation to an officer, who, by law, has none, is not, in substance, increasing his compensation. As well might it be said that, to permit a tenant to prove that his landlord had no title, would be no violation of the rule, that 'a tenant can not dispute his landlord's title,' and this upon the ground that so doing is not disputing his title, but merely showing that 'he had no title to dispute.' A vicious practice had prevailed in legislatures and county boards, of inter-

meddling with the compensation of officers after their election, increasing that of friends and reducing that of those not in favor. This was the evil to be cured. To permit a county board to lie by until after the election of a county officer, and afterwards provide a large compensation for the officer, if a friend, and a meagre compensation if otherwise, is, I think, to permit a plain violation of this constitution. If this be not so, the county board may, at any time, by an order made just before an election of a county clerk, rescind all orders theretofore made fixing the compensation of that officer, and then, after the election is over, may fix a large compensation if the successful candidate be in favor, or a small compensation if he be not in favor, and thus the constitution may, in this regard, become a dead letter."

Our attention has been called to no case from this court where the question has been presented. We have held, however, that the inhibitions of the constitution relate to public officers receiving salaries payable to them from the public treasury as such, and not to officers compensated by fees paid to them by the person for whom he performed the service; holding that the former were within the inhibitions against change, while the latter were not. Since the inhibition of the constitution is against any increase or decrease in the "compensation" of a public officer, as well as against any increase or decrease in the "salary" of such an officer, it is difficult to see any sound reason for the distinction made in the cases cited; but conceding them to be correctly decided, we cannot conceive that either line argues that an officer elected for a fixed term under a statute providing that he shall serve without compensation, may afterwards, and during the term for which he is elected, be awarded a substantial salary.

Nor are we cited to any case from another jurisdiction where the precise question has been presented. In

Illinois during an early period, and in Kentucky more recently, the laws provided that the salaries of certain of the county officers should be fixed by county boards at a meeting preceding the time of the election of such officers, and it was held by the courts of these states that, where the duty was neglected or omitted prior to the election, the boards could lawfully fix such salaries after the election. In Illinois (see the case above cited) the decision was rested squarely on the principle that to provide a salary where before there was none was not to increase the salary of an officer during the term for which he was elected. The Kentucky cases seem to be rested on a different principle, although in some of the cases language can be found which indicates that this was one of the reasons which influenced the court's conclusion. But we cannot think these cases in point on the facts here presented. There the law itself provided for a salary, making it the mandatory duty of the boards to fix the amount, which was required to be reasonable. Clearly, therefore, the officers could not be deprived of that which the law contemplated they should have by the mere inaction or refusal to act on the part of the boards. But here the law not only did not provide for a salary or for compensation, but, on the contrary, expressly provided that there should be no compensation. To give them compensation during the terms for which they were elected is plainly a direct violation of the spirit and purpose, if not the letter, of the constitution.

From the dates given in the statement, it will be seen that commissioners Remsberg and Bridges were each elected and inducted into office prior to both the passage of the act providing the salary and its approval by the electors of the port district. As to them the rule announced is strictly applicable. The case of commissioner Lippy is somewhat different. He was

elected and inducted into office subsequent to the passage of the act, but prior to its approval by the electors. It is contended on his behalf that, since the legislature, prior to his election, authorized the port district to pay him a salary at its option, the constitutional inhibitions are satisfied, since the vote of the district was only necessary to make the act operative. But the act was not complete in itself. Alone, it did not create the salary. It required the favorable vote of the electors of the district to make the act effective in this respect. In other words, the act simply empowered the district to pay a salary to its commissioners if it so desired. Since the constitutional prohibitions operate against the district as well as the state, it must follow, we think, that the rule of the constitution is as applicable to this commissioner as it is to the others.

Our conclusion is that the order of the trial court must be reversed, and the cause remanded with instructions to deny the application for the writ of mandate.

It is so ordered.

HOLCOMB, C. J., PARKER, and MOUNT, JJ., concur

[No. 14726. *En Banc.* July 22, 1919.]

ENOCH E. MATHISON, *Respondent,* v. WILLIAM ANDERSON *et al., Appellants.*[1]

APPEAL (173)—TIME FOR TAKING—COMMENCEMENT OF PERIOD. The time for taking an appeal commences to run from the time the judgment is filed and marked filed and entered on the appearance docket, and not from the date of its actual recording.

APPEAL (498)—RECALL OF REMITTITUR—JURISDICTION. Where the supreme court did not acquire jurisdiction because the appeal was not taken within ninety days, the remittitur may be recalled to hear a motion to dismiss, filed but not properly presented to the court at the time set for hearing.

Appeal from a judgment of the superior court for Wahkiakum county, Hewen, J., entered July 31, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Dismissed.

J. Bruce Polwarth and *William Stuart,* for appellants.

Enoch E. Mathison, for respondent.

ON PETITION TO RECALL REMITTITUR.

MITCHELL, J.—In this case an opinion was filed [103 Wash. 449, 174 Pac. 642] reversing the judgment of the lower court. Subsequently, upon application and showing made by the respondent, within a few days after the remittitur was sent down to the lower court, an order was made on February 24, 1919, recalling the remittitur that we might further consider the question of the court's jurisdiction to entertain the appeal. The point made by respondent is that the notice of appeal was not given within ninety days after the entry of the final judgment. At the hearing of the appeal on June 18, 1918, this court was not provided with any

[1]Reported in 182 Pac. 622.

brief by respondent whereby our attention could have been orderly called to any lack of jurisdiction. It happened, however, that a few days prior to June 18, 1918, respondent had served and filed a motion to strike the statement of facts and dismiss the appeal and noticed it for hearing on June 18th, which was not a regular motion day. The motion was not presented to the court on that day. In the application for the recall of the remittitur, respondent called attention to the fact that, in the motion to strike the statement of facts above referred to, there was also included, as a ground for dismissal, a reference to the fact that the notice of appeal was not given within ninety days from the date of the entry of the judgment, and in this application made plain the facts and records upon which that contention was based.

After the order was made recalling the remittitur, respondent served and filed another motion to dismiss the appeal, duplicating, in effect, the contents of his petition to recall the remittitur on the ground that the notice of appeal was not served within ninety days, thus reminding us of what we were already aware, that the remittitur was recalled, "that the jurisdiction of this court to pass upon the case be further considered by the court."

We have considered the point involved as it appeared at the date of the order and as the same still appears. The affidavits in behalf of both parties used on the hearing of the petition to recall the remittitur cleared away the confusion thertofore existing concerning the fact that the county clerk, whose affidavits have been used on the hearing of all the motions, understood that the act of the actual recording of the final judgment and not the date of its being filed constituted its entry under the terms of the appeal statutes. It clearly appears now that the final judgment

was signed by the trial judge and filed and marked filed and entered on the appearance docket by the clerk on July 31, 1917, and that, on the ninety-first day thereafter, to wit, October 30, 1917, the notice of appeal was given. Under Rem. Code, § 1718, and upon the authority of many cases in this court, such as *Crawford v. Seattle, Renton & Southern R. Co.*, 92 Wash. 670, 159 Pac. 782, the notice of appeal was not given in time to confer jurisdiction upon this court.

There is no alternative but to set aside the former opinion of this court in the case and to dismiss the appeal; and it is so ordered.

MOUNT, TOLMAN, FULLERTON, MAIN, and MACKINTOSH, JJ., concur.

HOLCOMB, C. J. (concurring)—Although compelled by the state of the case to do so, I concur in the above result with great reluctance, because the judgment appealed from was a most ill-founded one, and our former judgment of reversal was eminently correct. Moreover, the procedure of counsel for respondent was exceedingly inapt and highly untimely. The "juggling" of the record below, so as to confuse it, was also reprehensible.

However, this court acquires jurisdiction only within a definite statutory period, which was exceeded, and respondent seems to have raised the jurisdictional question before this court had finally lost jurisdiction to determine its jurisdiction.

[No. 15436. Department Two. July 22, 1919.]

THE STATE OF WASHINGTON, *on the Relation of Eureka Cedar Lumber & Shingle Company, Plaintiff*, v. THE SUPERIOR COURT FOR PIERCE COUNTY, *M. L. Clifford, Judge, et al., Defendants.*[1]

PROHIBITION (11)—REVIEW—ERRORS AND IRREGULARITIES. Upon application for a writ of prohibition to prevent the discharge of a vessel by substituting a bond in lieu thereof for the protection of lien claimants, the supreme court will not consider errors of the trial court in fixing the amount of the bond or other security for the payment of claims or receiver's and attorney's fees and disbursement, since they are merely errors occurring in the exercise of jurisdiction that may be corrected by appeal.

MARITIME LIENS (12-16)—ENFORCEMENT—SUBSTITUTION OF BOND. The court, in virtue of its inherent equity power, has jurisdiction, in a pending action to foreclose liens for the construction of a ship, to release the property and substitute therefor a deposit of money or a bond; the statute, Rem. Code, § 1182, simply providing that the liens may be foreclosed in a civil action, and being silent as to the matter of substitution of security.

Application filed in the supreme court June 27, 1919, for a writ of prohibition to the superior court for Pierce county, Clifford, J., to prevent certain acts in receivership proceedings. Denied.

W. H. Abel, for relator.

Grinstead & Laube, for defendants.

FULLERTON, J.—This is an application made originally in this court for a writ of prohibition against the superior court of Pierce county requiring it to desist and refrain from certain described acts in a receivership proceeding. An alternative writ was issued upon the filing of the application, to which the trial court has made return. The cause is before us

[1]Reported in 182 Pac. 607.

on the question whether the alternative writ shall be made peremptory.

The record in this court is in many respects incomplete and unsatisfactory, making the pertinent facts somewhat difficult to gather. The facts are, however, as we understand them, in substance, these: The defendant Martinolich Ship Building Company, a corporation organized under the laws of this state, contracted to build for the Dockton Motorship Company, a corporation organized in another state, a steam schooner. The vessel was partially completed by the Martinolich Company at its own yards in Pierce county, after which it was moved to the yards of the Foundation Company, in the same county, where work thereon was continued by the Dockton Motorship Company; the Martinolich Company in the meantime having become insolvent. During the time the Martinolich Company had possession of the vessel it incurred large obligations to divers persons for materials used in the vessel's construction, which it did not meet, among which was an obligation to the applicant herein, the Eureka Cedar Lumber and Shingle Company. The Eureka Company claims the balance due on the account to be $7,604.12, although the amount is disputed by the owner of the vessel. On May 3, 1919, the applicant, claiming a lien upon the vessel under the provisions of § 1182 of the code (Remington's), began an action in the superior court of Pierce county to recover the sum named and to foreclose the lien. It made parties defendant the Martinolich Company, one Egil Naesheim, and the Dockton Motorship Company. In its complaint it alleged facts showing the obligation of the Martinolich Company to it, its right of lien on the vessel, the insolvency of the Martinolich Company, and further alleged that the vessel was then exposed to the weather and was deteriorating on account

thereof, and that such deterioration would amount, during the summer season of 1919, to forty per cent of the actual value of the vessel; that the vessel was only partially completed; that there was no adequate fire protection for the vessel and that its security was subject to serious loss, risk and hazard. It alleged that there were numerous other materialmen having unpaid claims for materials furnished and which were used in the construction of the vessel; that work had ceased on the vessel and that there was no likelihood of such work being resumed. It further alleged that an emergency existed for the appointment of a receiver.

At the time of the filing of the complaint, there was also filed by the attorney representing the plaintiff the answer of the Martinolich Company, which answer admitted all of the allegations of the complaint and joined in the prayer for the appointment of a receiver. On the showing made, the trial court appointed a receiver, fixing his bond in the sum of $5,000, and directing that he forthwith take possession of the vessel. It was further ordered that the defendants appear before the court on June 4, 1919, and there show cause, if any they had, why the appointment of the receiver should not be confirmed and his appointment continued in force until the final hearing of the cause.

The receiver qualified by giving the bond directed and immediately took possession of the vessel, appointing a keeper therefor whom he contracted to pay at the rate of five dollars per day. On June 28, 1919, the receiver made a report to the court to the effect that he found representatives of the owner of the vessel in its possession doing work thereon looking to its completion, and "having no desire to inconvenience the owner, has permitted the representatives of said owner to continue said work of completing said vessel,

but subject, however, at all times, to the possession and control by your receiver," estimating that the time required for the completion of the vessel would be about three weeks. The receiver further reported that there were valid liens and claims against the vessel in the neighborhood of $40,000; that he believed that such claims would be adjusted and paid by the owners before any great length of time, but believed it unsafe to allow the vessel to go uninsured, and therefore prayed that he be authorized to insure it as the representative of the creditors, in the sum of $50,000. On the filing of the report, the court made an order confirming the receiver's acts, and directing that he insure the vessel in the sum named. This order was made without notice to the owner of the vessel or to the owner's representatives found in its possession. On June 4, 1919, the owner appeared in the proceeding, at which time, by agreement of the parties, the hearing on the question whether the temporary appointment of the receiver should be made permanent was continued until June 19, 1919.

Between the time of the commencement of the action and June 19, 1919, a number of persons obtained leave of court and intervened in the action, claiming obligations due them from the Martinolich Company for materials and labor furnished and used in the construction of the vessel, the several amounts of which they asked to have decreed to be a lien upon the vessel and that the vessel be sold in satisfaction thereof. These claims aggregated $18,859.33.

On June 19, 1919, a hearing was had on the show cause order of the court, at which time the Dockton Motorship Company moved to quash the order appointing the receiver on the ground that it was made upon a "fraudulent and collusive showing." The court did not rule upon the motion directly. It found

from the evidence given at the hearing that certain of the claims had been paid, leaving a balance of $18,094.34; that of this sum the claim of George Broom for $4,000 was not due because he had not completed the contract on which the same was payable, and that the owner was willing to deposit the sum in court to be paid to Broom when the same should be earned; that the remaining claims were disputed by the owner, and that the owner offered in open court to give a bond in such sum as the court might fix, with sureties to be approved by the court, conditioned to pay to the claimants such sums as the court might adjudge to be due thereon, together with their proper costs and charges. In addition to the foregoing recitals, it appeared that the owners had expended in excess of the sum of $360,000 in constructing the vessel; that it was nearing completion and was, or could be, chartered for ocean-going freight, and that to tie up the vessel pending the determination of the plaintiff's and interveners' actions would cause the owners great and irreparable losses. The court thereupon made and signed the following order:

"(1) That the clerk of this court be, and he hereby is, instructed and directed to cause to be certified and retain the said check payable to George Broom, in the said sum of four thousand ($4,000) dollars, until further order of this court.

"(2) That upon the defendant Dockton Motorship Company filing a bond herein in the penal sum of eighteen thousand ($18,000) dollars, with surety to be approved by this court, payable to the clerk of this court for the benefit of the plaintiff and the intervenors herein, who have filed complaints in intervention herein as their respective interests may appear, and conditioned for the payment of any claims of any and all of the above named lien claimants and intervenors, including the plaintiff herein, hereafter adjudged to have liens against the motor-schooner 'Dockton'

upon their several claims as filed herein, together with any costs taxed in favor of said respective claimants and of any costs in this action hereafter adjudged to be payable by said Dockton Motorship Company, including the costs of receivership, if any, hereafter adjudged against said Dockton Motorship Company, and upon said surety or sureties upon said bond entering their general appearance in writing in this action, the order to show cause herein shall be thereby forthwith cancelled and annulled, and said A. R. Titlow, named as receiver in said order of this court of May 23d, 1919, shall surrender and deliver to the defendant Dockton Motorship Company all of the property heretofore seized and held by him as such receiver in this action.

"(3) That all matters pertaining to the validity of the appointment of said receiver by the order of May 23d, 1919, and of all costs arising thereunder, are reserved for subsequent adjudication, the defendant Dockton Motorship Company having waived none of its objections to the validity of such appointment, and that the filing of bond and the entering of appearance by the surety or sureties herein shall not constitute or be deemed a waiver on the part of the Dockton Motorship Company of any of its objections heretofore entered to the appointment of the receiver under the order of May 23d, 1919, to all of which the plaintiff excepts and its exception is allowed; to all of which the respective intervenors except and exceptions allowed."

The hearing in this court upon the return took a somewhat wide range. Not only is the power of the court to discharge the vessel from the liens of the claimants by substituting a bond in lieu thereof questioned, but it is claimed that the bond is insufficient in amount to meet the claims should they be adjudged valid obligations. Especially is it argued that no provision is made to meet the disbursements by the receiver, made under the express orders of the court, or his fees or the fees of his counsel, should it be ad-

judged that he was not inadvertently appointed; and that the deposit in favor of Broom covers only the face of his claim, making no provision for his costs and disbursements already expended, or such disbursements as may thereafter occur in the prosecution of his claim. But we think it manifest that these latter questions are not now before us. If the court had jurisdiction to make the order of substitution, these are mere errors occurring in the exercise of jurisdiction which it is not the office of a writ of prohibition to correct. The writ of prohibition, under our practice, arrests the proceedings of a trial court only where such court is acting without or in excess of its jurisdiction and there is no plain, speedy and adequate remedy in the ordinary course of law. Rem. Code, §§ 1027, 1028. For errors occurring in the exercise of jurisdiction, the remedy is by appeal, or, if the remedy by appeal be inadequate, by a writ of review.

The question before us, therefore, is a narrow one—has the court, in a pending action to foreclose a lien upon personal property, power to release the property from the lien by substituting therefor a deposit of money or a bond. We think it can, and this in virtue of its inherent equity power. Since the relator by its action has invoked the equity powers of the court (*Washington Iron Works Co. v. Jensen*, 3 Wash. 584, 28 Pac. 1019; *Thompson v. Allen*, 56 Wash. 582, 106 Pac. 173, 134 Am. St. 1124), the court can compel it to do equity, and certainly it is doing nothing more than compelling it to do equity to compel it to accept another form of lien for the lien it has, when to refuse would compel the owner of the property either to forego its right to contest the justness of the claim or submit to a loss for which it has no means of redress. After all is said, the purpose of the statute is to afford laborers and materialmen, furnishing labor

and material used in the construction of a vessel, security for the obligation due them. They suffer no loss, therefore, when other adequate security is made available to them. While, on the other hand, as this particular case illustrates, serious and irreparable losses may be occasioned the owner of the vessel if the form of the security may not be changed.

It is true, as the relator says, the statute does not expressly permit a substitution of liens. But it can be said with equal truth that the statute does not prohibit it, and the most that can be claimed in this regard is that the statute is silent in the matter. The contention would have force had the statute prescribed a procedure for the enforcement of such liens; it could then be contended that the remedy of the statute was exclusive. But the statute does not do this. It simply provides that the lien may be foreclosed in a civil action brought in the superior court. This, as we have shown, must be an action of equitable cognizance, which is governed by the equitable rules pertaining to such actions.

We find nothing in the case of *Kalb-Glibert Lumber Co. v. Cram,* originally determined in 57 Wash. 550, 107 Pac. 381, and afterwards reversed in part in 60 Wash. 664, 111 Pac. 1050, which militates against the conclusion here reached. But it is needless to pursue the inquiry. Our conclusion is that the court had power to make the substitution it did make; and that the question whether the substitution made was adequate, or otherwise free from error, cannot be brought before us for review in this form of procedure.

The temporary writ is quashed and a peremptory writ denied.

HOLCOMB, C. J., TOLMAN, PARKER, and BRIDGES, JJ., concur.

[No. 15211. Department One. July 23, 1919.]

E. M. GORDON *et al., Respondents,* v. C. D. HILLMAN *et al., Defendants,* PACIFIC EXCURSION COMPANY, *Garnishee Defendant-Appellant.*[1]

RECEIVERS (18) — APPOINTMENT — NOTICE — NECESSITY. The appointment of a permanent receiver for an insolvent corporation without notice is without justification and void, whether appointed prior or subsequent to judgment.

SAME (18)—NOTICE—SUFFICIENCY. The service of a writ of garnishment upon a corporation does not dispense with or take the place of notice of application for the appointment of a receiver of the corporation, after judgment against it.

Appeal from an order of the superior court for King county, Ronald, J., entered September 30, 1918, denying the vacation of an order appointing a receiver. Reversed.

Geo. H. Rummens and *Gay & Griffin,* for appellant.

Byers & Byers and *Aust & Terhune,* for respondents.

MITCHELL, J.—E. M. Gordon *et al.* obtained a judgment against C. D. Hillman *et al.*, and afterwards procured a writ of garnishment and had it served upon the Pacific Excursion Company, a corporation. The company, in responding to the writ, by way of a special appearance, moved to quash it. Upon the court's denial of the motion, the company refused to plead further, and judgment was entered against it. Thereafter, without notice to the company, Gordon *et al.* presented to the trial court a motion, supported by the affidavit of their attorney, for the appointment of a receiver for the company; and at once the trial court appointed a receiver. The affidavit referred to the judgment and alleged that execution had been issued

[1]Reported in 182 Pac. 591.

thereon and returned unsatisfied, and that the company was insolvent. Upon learning of the appointment of a receiver, the company, by special appearance, promptly made application to the court for an order setting aside the order by which the receiver had been appointed, claiming the appointment was void, among other reasons, because it was made without any notice to the company. The application to vacate the order was denied, whereupon the company, continuing its special appearance, has appealed, still preserving its special appearance in this court.

The appointment was not of a temporary receiver as an emergency order until the company could be notified to appear and show cause, but purports to be the appointment of a permanent receiver. This court has uniformly held that the appointment of such a receiver without notice is without jurisdiction and void. *State ex rel. Ridgely v. Superior Court,* 86 Wash. 584, 150 Pac. 1153. Respondents admit such to be the rule where the receiver is appointed prior to judgment, but contend notice of an application is not necessary after judgment. There is no difference; notice is required in either case. The appointment requires proof of a necessity therefor, and in this particular case respondents submitted proof by way of affidavit. It is an adversary proceeding and, except in the case of an emergency order, the court is without jurisdiction to determine the existence of a state of facts justifying the taking and retaining of another's property by means of a receiver without giving that other an opportunity to be heard at the time of the determination.

Respondents further contend that, if notice of an application for the appointment of a permanent receiver was required, the original process, or writ of garnishment, was sufficient. It is difficult to see how

the service of a writ of garnishment could give notice that later on, after judgment against the garnishee defendant, the judgment creditor would present to the court a motion and affidavit and at once take an order appointing a permanent receiver. The contention is without merit.

Reversed, with direction to vacate the order appointing a receiver.

HOLCOMB, C. J., TOLMAN, MACKINTOSH, and MAIN, JJ., concur.

[No. 15232. Department One. July 23, 1919.]

UNION MACHINERY & SUPPLY COMPANY, *Appellant*, v. PAUL L. THOMPSON, *Respondent*.[1]

TENDER (10)—KEEPING TENDER GOOD. In an action at law under the claim and delivery statute for a balance due or return of property conditionally sold, the plea and defense of tender before suit is bad unless the tender is kept good by bringing the money into court.

Appeal from a judgment of the superior court for Kitsap county, French, J., entered August 16, 1918, in favor of the defendant, in an action of replevin, tried to the court. Reversed.

Robert A. Eaton, for appellant.

Philip Tworoger, for respondent.

MITCHELL, J.—Plaintiff, by a contract of conditional sale, transferred to defendant two donkey engines. The terms of the sale were part cash and the balance to be paid in stated amounts at specified dates. The larger part of the last payment being long overdue, plaintiff gave defendant written notice that, unless payment was made on or before a certain day, notice

[1]Reported in 182 Pac. 573.

of default would be served and steps taken to obtain possession of the property. Upon the expiration of the time limit thus fixed and nonpayment on the part of defendant, a written declaration of default and demand for the return of the engines was served upon defendant, and shortly thereafter this action in replevin was brought to recover possession of the property. The complaint is in the usual form under our practice in claim and delivery actions. Defendant, in his answer, denied many of the allegations of the complaint, and by way of affirmative defense, alleged that, prior to the declaration of default, he tendered to plaintiff the balance due on the contract. Plaintiff's reply denied the allegation of tender of payment. In his answer, defendant did not keep his alleged tender good, nor bring the money or any portion of it into court. A trial was had before the court sitting without a jury, and resulted in a judgment in favor of the defendant, from which the appeal has been taken.

The cause must be determined on the strength or the weakness of the defense of tender of payment. That the affirmative answer constituted no defense to the action was urged by objections at the trial, which were treated as a demurrer by the court and overruled. In regard to the alleged tender, there is a sharp conflict in the evidence, and, without deciding, we may assume, as did the trial court, that it was sufficiently established, and still it would be no defense to the action. In an action at law, such as this, there must be further allegation and proof of keeping the tender of payment good and of bringing the money into court. The record is silent as to both of these things.

Upon this subject, in the mortgage foreclosure case of *Murray v. O'Brien*, 56 Wash. 361, 105 Pac. 840, 28 L. R. A. (N. S.) 998, it was said:

"While at law the rule that a tender must be kept good by payment in court is well-nigh universal, it is not so in equity."

And, recently, in the case of *Vergonis v. Vaseleou*, 105 Wash. 441, 178 Pac. 463, which was an action in replevin at the instance of the vendor upon default of the vendee in payment of the purchase price of goods sold by a contract of conditional sale, wherein the defendant in his answer alleged tender of payment of the amount due, both prior to and after the commencement of the action, and also offered by his answer to pay such sum as the court should adjudge to be due, but did not bring into court the amount alleged to have been tendered, this court, after discussing the facts concerning the tender, said:

"But, more than this, the money tendered was not brought into court. It is true that we have held in actions of equitable cognizance, where the plaintiff must rely upon equitable principles to sustain his cause of action, that it is sufficient to plead willingness to pay without an actual bringing of the money into court. But the present action is a legal action, to which the plea of tender is a legal defense, and the rule cited is without application."

Appellant having proved its case and respondent having failed to establish any defense, the judgment is reversed with directions to the trial court to enter judgment for appellant.

HOLCOMB, C. J., TOLMAN, MACKINTOSH, and MAIN, JJ., concur.

[No. 15323. Department One. July 23, 1919.]

C. P. DICKEY, *Personally and as Administrator etc., Respondent,* v. ALASKA PACIFIC FISHERIES, *Appellant.*[1]

SALES (154)—DAMAGES (70)—DELAY. Damages for delay in performing a contract to deliver piles at a certain time, time being of the essence of the contract, do not include, as within the reasonable and natural consequence of the delay, damages from conditions in Alaska not called to plaintiff's attention, but will be confined to demurrage paid the railway company on waiting cars and to the damages caused by the detention of defendant's scow at the loading point for lack of piles to load; there being no information to plaintiff that any further loss would be caused by the delay.

Cross-appeals from a judgment of the superior court for King county, Ronald, J., entered December 23, 1918, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Modified.

C. H. Hanford, for appellant.

Million & Houser and *James W. McBurney,* for respondent.

TOLMAN, J.—Both parties having appealed from the judgment below, they will be referred to as plaintiff and defendant. On December 28, 1917, these parties entered into a written contract by the terms of which the partnership of Angevine & Dickey, now represented by plaintiff, agreed to furnish 1,630 piles of certain specified dimensions, to be delivered on board cars at Darrington, Washington, on or before February 28, 1918, time being declared to be of the essence of the contract; the piles to be inspected and accepted by defendant at the time and place of loading, and payment to be made at the contract price, from time to time, with weekly settlements. At the time fixed by

[1]Reported in 182 Pac. 595.

the contract for complete delivery, only about one-third of the piles had been delivered, and the remaining two-thirds were delivered from time to time up to about April 24, 1918. Plaintiff alleges that the piles so delivered amounted in value, determined by the contract price, to $26,312.17, and admits the receipt of payments on account to the extent of $21,000 only, and demands judgment for the balance.

Answering plaintiff's complaint, the defendant denied the receipt of piles under the contract in excess of the value of $26,124, pleaded payments on account aggregating $22,374.92, and, by way of counterclaim, affirmatively alleged, that it was the owner of and operating certain salmon canneries in Alaska, depending for the supply of fish to be canned being obtained through the use of fish traps, and that it required for its business during the fishing season of 1918, the piles contracted for; that the fishing season is of short duration, and it is necessary to prepare and set the traps for which said piles were required in advance of the time when the salmon commence to run; that considerable time was required for the transportation of the piles to the location of the fish traps in Alaska; all of which facts were known to and considered by the parties at the time of the making of the contract; and that it was then known and understood that the failure to deliver the piles within the period specified in the contract would cause serious damage to the defendant; that the piles were not delivered within the time specified in the contract, there being a delay of nearly two months in completing the deliveries; that, by reason of such delay on the part of the contractors, cars were detained at the loading station, for which the defendant was obliged to pay the railway company demurrage amounting to $111.24; that for the transportation of the piles to Alaska, defendant chartered

a scow at an expense of $20 per day; and in the month of April such scow was detained at Everett, waiting to receive the last cargo of said piles, for a period of twenty-two days in excess of the time which would have been sufficient for loading if the load had been ready; that defendant sent a tug from Ketchikan, Alaska, to Everett at the time when said scow should have been loaded, for the purpose of towing the scow with its cargo to Alaska, but the scow not being loaded, as it should have been, it was necessary for the tug to return to Alaska without a tow, and to charter another tug to take said scow and its cargo to Alaska when it was finally loaded; that defendant's loss thereby was the value of the use of the tug first mentioned for sixteen days; that defendant provided a pile-driver with equipment and crew for driving said piles in its work of constructing fish-traps, and that said tug was required for use as a tender in connection therewith, and by reason of its absence the pile-driver and its crew were necessarily idle during the whole of said sixteen days, whereby defendant sustained an additional loss amounting to the further sum of $1,600; that another scow was chartered by the defendant and used for the transportation of a cargo of said piles from Everett to Alaska, for which $20 per day was paid for the time she was in use and until returned to Everett, and after unloading in Alaska, because of the lack of an available tug, said scow was detained for a period of twenty-one days, which delay would not have occurred if the piles had been delivered according to contract; that all of said losses, and the detention of the tug, the pile-driver and crew and the two scows, were entirely caused by the failure of the plaintiff to deliver said piles within the time stipulated in the contract. The prayer of the answer is that plaintiff take nothing, that the defendant have judgment for the excess of its

damage over the total purchase price remaining unpaid for all piles delivered, for costs, and for general relief.

Plaintiff, by reply, denies the affirmative matters set forth in the answer, and alleges that, while plaintiff was in the performance of the contract, at the instigation and request of the defendant, the plaintiff took another and entirely separate contract to supply piles to the Northwest Fisheries Company, which new and additional contract was taken only after plaintiff had been assured by the defendant that the defendant would not be ready for the last cargo of piles until the 20th day of April, and had it not been for the action and conduct of the defendant pleaded, plaintiff would have been ready and able to deliver all of said piles as rapidly as they were required by the defendant.

The trial court by its judgment allowed plaintiff the full amount claimed for the piles, found that payments had been made on account to the amount of $22,333.78, allowed the amount claimed for demurrage paid the railway company, found that barge No. 8 was detained in Alaska for a period of nineteen days, barge No. 11 was detained at Everett for a period of nineteen days, that defendant was entitled to damages at the rate of $20 per day for each barge, and offset the sum of $760 on that account, entering its judgment in favor of plaintiff and against defendant for $3,215.

The questions involved are principally questions of fact, and we have carefully examined the evidence with a view of determining whether or not in any respect it preponderates against the findings of the trial court. After a most careful consideration, we are forced to the conclusion that there is no competent evidence in the case proving, or tending to prove, that the plaintiff delivered piles to the defendant of any greater value than the sum of $26,124. We are satis-

fied that the demurrage paid the railway company was properly allowed, and, also, that barge No. 11 was delayed at Everett for a period of nineteen days, as found by the trial court, at an additional expense to defendant of $20 per day, or a total of $380. The evidence as to the detaining of barge No. 8 in Alaska is in no respect clear or satisfactory; and it appears by the testimony, without contradiction, that defendant had at all times a supply of piles on hand in Alaska; that its work was in no respect delayed there by lack of piles; and that the detaining of scow No. 8, if it was detained, was due, like the going back of the tug without a tow, and the idleness of the pile-driver for lack of a tender, to matters and causes which could not have been within the contemplation of the parties at the time of the making of the contract. Nor does the evidence preponderate against the finding of the trial court that the defendant did not suffer loss by reason of these last mentioned matters.

"Damages Arising Out of Special Circumstances.—In addition to general damages, the injured party is entitled to recover special damages which arise from circumstances peculiar to the particular case, where those circumstances were communicated to or known by the other party at the time the contract was made; that is, he may recover such damages as are the reasonable and natural consequences of the breach under the circumstances so disclosed, and as may reasonably be supposed to have been in the contemplation of both parties. In such case the special circumstances become an implied element of the contract, and of the duty thereby imposed. In order to recover special damages under this rule, however, it must appear that at the time of the making of the contract the defendant had reasonable notice of the special conditions rendering such damages the natural and probable result of such breach. Otherwise the damages recoverable will be limited to those resulting from the ordinary and

obvious purpose of the contract. The damages resulting by reason of their existence are disallowed in such case, not because they are uncertain, nor because they are consequential or remote, but because they cannot be fairly considered to have been within the contemplation of the parties when the contract was made." 8 R. C. L., p. 459, § 27.

Since conditions in Alaska were at no time called to plaintiff's attention, and no notice was given that defendant would or might suffer anything other than the ordinary damages, and since there is no evidence that plaintiff, at the time of making the contract, or at any other time, had any information that loss would be occasioned by delay in delivery beyond the damage caused by the detaining of the scow at Everett or lack of piles for use, and since defendant had piles on hand at all times in advance of its needs, we conclude that, under the facts of this case, no allowance should have been made beyond $20 a day for nineteen days, or $380, covering the time of the detention of the scow at Everett. Nor do we think the plaintiff's attempt to confess and avoid can be sustained. Plaintiff's contract with the Northwest Fisheries Company was made before the occurrence of the conversation with the witness Nelson, in which he informed plaintiff that the scow would be delayed fifteen or twenty days after April 1 in returning to Everett for the last load of piles, and we are convinced that such conversation had nothing to do with the taking on of the new contract, and that plaintiff's delay in making delivery was not caused or induced by such conversation.

The judgment appealed from should be modified by fixing the value of the piles delivered at $26,124, deducting therefrom, first, the payments on account, of $22,333.78, then the demurrage of $111.24, and lastly, damages for the detention of the scow at Everett,

$380, and a judgment entered in favor of plaintiff and against defendant for $3,298.98, with legal interest from the time of the filing of the complaint. Neither party will recover costs on this appeal.

HOLCOMB, C. J., MACKINTOSH, MITCHELL, and MAIN, JJ., concur.

[No. 15355. Department Two. July 23, 1919.]

BREWSTER CIGAR COMPANY, INCORPORATED, *Respondent*, v. FRANK ATWOOD, *Appellant*, RALPH HAGY, *Receiver of the Richmond-Grafke Company, Incorporated, et al., Defendants.*[1]

PRINCIPAL AND SURETY (26)—DISCHARGE OF SURETY—CHANGE IN PARTIES TO OBLIGATION—SURRENDER OF LEASE. The sureties upon the bond of a lessee, obligated with their principal to perform the terms of a sublease of part of the leased premises, are not released by the fact that the lessee surrendered its lease and that the sublessee subsequently remained in possession and paid rent to the successors in interest without complaint until ejected; but are holden under the terms of the bond to maintain the sublessee in quiet and peaceful possession of the property.

LANDLORD AND TENANT (87, 88)—EVICTION—ACTS BY LANDLORD. Where a sublease provided that the lessor should cut back a portion of the adjoining and of the leased premises for a joint entrance, a change in and obstruction of such entrance in violation of the sublease and notice that the sublease was terminated and would be recognized only as a tenancy from month to month, constitutes an eviction, entitling the sublessee to move out and to damages.

SAME (91)—EVICTION—DEFENSES. In an action against a lessee and its sureties for damages for evicting its sublessee, it is no defense that the sublessee violated the law in allowing dice shaking, where no objection was made thereto and it was not evicted for that reason, but because the dominant tenant changed the building in violation of the terms of the sublease and desired the sublessee's removal.

[1]Reported in 182 Pac. 564.

Appeal from a judgment of the superior court for King county, Allen, J., entered November 19, 1918, upon findings in favor of the plaintiff, in an action in tort. Affirmed.

Ryan & Desmond, for appellant.

Gill, Hoyt & Frye and *Walter Schaffner,* for respondent.

MOUNT, J. — This action was brought against the principal and the sureties upon a bond for the faithful performance of a lease, to recover damages on account of the eviction of the plaintiff from leased premises. The case was tried to the court without a jury, and resulted in a judgment in favor of the plaintiff for twelve hundred dollars. Mr. Atwood, one of the sureties upon the bond, has appealed from that judgment.

The facts are not disputed. They are as follows: In the year 1912, John J. Ferguson was the owner of a building known as the Brooklyn Building, located on the southeast corner of Second avenue and University street, in the city of Seattle. On December 4th of that year, he leased this building to Albert E. Grafke for a period of fifteen years. Thereafter the lease was assigned by Mr. Grafke to the Richmond-Grafke Company, a corporation. The portion of the premises on the first floor on University street was occupied by a drug store operated by this corporation. A space fronting approximately ten and one-half feet on Second avenue, adjoining the drug store on the south, was used and occupied as a cigar store. The cigar store was twenty-four feet deep. On June 13, 1916, the Richmond-Grafke Company sublet to the respondent that portion of the premises called the cigar store. The sublease provided that the lessor would, at its own

expense, cut back the south display window of the drug store adjoining the cigar store four and one-half feet, and that the space between the display window on the demised premises and the northerly drug store display window, for a depth of four and one-half feet back from the sidewalk, should remain open and unobstructed for the joint benefit of the lessor and the lessee. The lease also provided:

"That, so long as said lessee shall keep and perform his covenants and agreements herein contained on his part to be kept and performed, the said lessee shall be kept in quiet and peaceful possession of said leased premises against the claims and demands of all persons whomsoever lawfully claiming or to claim the same or any part thereof."

At the time of the execution of this lease, the Richmond-Grafke Company, as principal, and defendants Chase, Sliter and Atwood, as sureties, executed a bond to the respondent in the penal sum of two thousand two hundred dollars ($2,200), conditioned that, if the lessor should fail to perform any of the covenants of the lease, the sureties would indemnify the lessee for any and all damages which he might sustain by reason of such breach of covenant.

Upon the execution of this lease, respondent remodeled this cigar store and conducted the same, paying the rental provided for in the lease, namely, two hundred dollars per month, to the Richmond-Grafke Company. Two hundred dollars was also paid for the last month that the lease was to run. The duration of the lease was for more than six years. In the year 1916, after the death of Mr. Ferguson, the owner of the fee, the Richmond-Grafke Company became financially embarrassed and was delinquent in its rental for the premises. Thereupon it entered into an agreement

with the executor of the estate of Mr. Ferguson whereby the original leasehold was canceled and the Richmond-Grafke Company then became a tenant from month to month. The respondent paid rent to the Richmond-Grafke Company under the sublease. Soon thereafter the Richmond-Grafke Company became insolvent and a receiver was appointed and continued in possession of the premises until the latter part of February, 1917. Respondent during this period paid rent to the receiver. Thereafter other persons succeeded to the rights of the Richmond-Grafke Company and occupied the premises and collected the rent from the respondent. On June 4, 1917, the executor of the Ferguson estate executed a lease to Joseph Leudan Company for the entire lower floor of the building, which included that portion occupied by the respondent, and on June 8, the agent of the Leudan Company notified the respondent that the Leudan Company was willing to allow the respondent to remain in possession of the cigar store on a month to month basis until definite plans regarding a change of the store were made; that the rental should continue at the rate of two hundred dollars per month. The respondent was also notified that it would be necessary for the Leudan Company to move the front of the property to the sidewalk line; that, if respondent was not satisfied with this arrangement, it should give written notice of intention to move. In pursuance of this notice, the Leudan Company commenced the remodeling of the store front and restored the south display window to its original position on the sidewalk line. While this work was being done, the respondent moved from the premises and claimed an eviction because of the obstruction of the entrance as provided for in the sublease. The trial court was of the opinion that the change of the front entrance without the con-

sent of the respondent was an eviction, and granted the respondent one thousand dollars damages for the depreciated value of the fixtures and two hundred dollars because of the last month's rental which had been paid.

Appellant contends, first, that he was released as a surety upon the bond because the original lease was surrendered by the principal, Richmond-Grafke Company, to the Ferguson estate, and because the respondent thereafter paid the rent to persons who acquired the interest of the Richmond-Grafke Company in the premises. We think it is plain from the facts that the sureties upon this bond were obligated with the principal to retain the respondent in the peaceful and quiet possession of the premises as they were leased. The fact that the Richmond-Grafke Company did not maintain its original lease, but surrendered the same, did not change the relation of the Richmond-Grafke Company or the sureties to the respondent. The respondent was permitted to remain in the premises by virtue of its lease, and paid its rent to the Richmond-Grafke Company during all the time that company had possession, and thereafter paid the rent to those who acquired the interest of the Richmond-Grafke Company in the premises. It is plain, therefore, that, as long as the respondent remained in possession, it remained there under the terms of the sublease executed by the Richmond-Grafke Company. It was through no fault of the respondent that the Richmond-Grafke Company did not remain in possession of the premises until the expiration of the original lease. So far as the record shows, the respondent had no voice in changing the terms of the original dominant lease, or in the assignment thereof to the different persons who acquired the interest of the Richmond-Grafke Company in that lease. The respondent was not in-

jured in any way by these assignments, but was permitted to remain in possession of the premises leased from the Richmond-Grafke Company and made no complaint until it was ejected, or until the sublease was terminated. The sureties upon the bond were therefore holden under the terms of the bond to maintain respondent in quiet and peaceful possession until the end of the term. In the case of *Cuschner v. Westlake*, 43 Wash. 690, 86 Pac. 948, we said:

"The interest of an under-lessee cannot be defeated by the mesne lessee's surrendering his estate in the premises to the lessor.

" 'When, before a surrender, third persons have acquired interests in the demised premises, a surrender by the lessee cannot affect their rights; as to them the surrender operates only as a grant subject to their rights, and the interest surrendered is considered as continuing to exist so far as is necessary to preserve their rights.' "

In support of this rule, a number of authorities are there cited. We think there can be no doubt that the sureties, along with the principal, were bound to maintain the sublease executed by the Richmond-Grafke Company to the respondent.

It is next contended that there was no eviction of the respondent from the premises. The lease from the Richmond-Grafke Company to the respondent provides that the lessor should, at its own expense, cut back the south display window of the drug store adjoining the demised premises four and one-half feet, and that the space between the display window on the demised premises and the northerly drug store display window, for a depth of four and one-half feet back from the sidewalk line, should remain open and unobstructed for the joint benefit of the lessor and the lessee. After the Leudan Company had acquired the interest of the Richmond-Grafke Company in the

original lease and had obtained possession of the whole premises, they changed this entrance. This was a violation of the terms of the lease. They not only changed the entrance, but they notified respondent that the lease was terminated and that they would recognize it only as a month to month tenant thereafter, and that, if respondent was not satisfied with this arrangement, it could give a twenty-day notice of removal. We are of the opinion that this notice, as well as the change in the entrance, constituted an eviction. The respondent accepted this as an eviction and moved from the premises, and was therefore entitled to recover damages. In the case of *Wusthoff v. Schwartz,* 32 Wash. 337, 73 Pac. 407, we said:

"It is a well established rule that actual force is not necessary to effect an eviction in law, but that any interference by the landlord with the full and substantial enjoyment by the tenant of the thing leased amounts to an eviction."

We are satisfied, therefore, that there was an actual eviction and that respondent was entitled to recover.

It is next contended by the appellant that because the evidence showed that respondent had permitted dice shaking for cigars upon the premises, which was in violation of law, respondent thereby forfeited its lease. It is sufficient to say upon this question that respondent was not evicted for that reason. If respondent had been evicted for that reason it could not have recovered from the appellant. Appellant or the owner of the dominant estate apparently made no objection to this sort of gambling and respondent was not evicted for that reason, but was evicted because the dominant tenant changed the building in violation of the terms of the lease and desired respondent's removal from the premises. The appellant cannot now

be heard to say that there was some other reason for which the respondent might have been evicted.

We find no error in the record, and the judgment is therefore affirmed.

HOLCOMB, C. J., PARKER, and FULLERTON, JJ., concur.

[No. 15107. Department Two. July 24, 1919.]

AUGUSTA FREEBURN, *Appellant*, v. JAMES L. FREEBURN, *Respondent*, LOUIS SHACKLEFORD *et al.*, *Additional Respondents*.[1]

DIVORCE (8)—GROUNDS—INABILITY TO LIVE TOGETHER. Where a wife was quarrelsome and such incompatibility of temperament existed between the parties that they could no longer live together as husband and wife, the court properly granted a divorce to the husband.

SAME (80)—DIVISION OF PROPERTY. Upon granting a divorce, the wife should not be restricted to a mere life interest in the home subject to taxes and upkeep which might be more than its use would be worth, but should be given the fee.

SAME (80). Upon granting a divorce, the proceeds of an advantageous contract, made after marriage, under which the husband was to receive large dividends from the operation of a mine until 1920, should be regarded as community property and the wife should have a half interest therein; but whether the contract will be renewed rests upon speculation, and the proceeds under any such renewal would be his separate property and should not be considered in the division.

Appeal from a judgment of the superior court for King county, Allen, J., entered October 10, 1918, upon findings in favor of the defendant, denying plaintiff separate maintenance and granting defendant a divorce, after a trial on the merits before the court. Modified.

[1]Reported in 182 Pac. 620.

Flick & Paul and *Walter S. Fulton,* for appellant.

John A. Shackleford, Lewis P. Shackleford and *O. G. Ellis,* for respondent.

MOUNT, J.—The plaintiff brought this action against her husband for divorce, alleging in her complaint as grounds for divorce, drunkenness, infidelity, cruelty and personal indignities rendering her life burdensome. For answer to the complaint, the defendant denied these allegations, and by way of cross-complaint and as grounds for divorce from his wife, alleged, in substance, extravagant habits, quarrelsome temperament of Mrs. Freeburn, cruelty, and personal indignities rendering his life burdensome. Plaintiff, for reply, denied these allegations of the cross-complaint. Thereafter the plaintiff obtained leave and filed an amended complaint in which she waived her claim for divorce and prayed for separate maintenance on the ground that the parties could no longer live together as husband and wife. Upon these issues, a lengthy trial was had, and at the close of the evidence, the trial court concluded that the plaintiff was not entitled to separate maintenance; that the defendant was entitled to a decree of divorce from the plaintiff because the plaintiff had repeatedly and habitually subjected the defendant to indignities and cruelties rendering his life burdensome; and "that such incompatibility of temperament exists between plaintiff and defendant James L. Freeburn that they cannot live together as husband and wife." The trial court also found that the property of the parties was all community property and of the "value of about fifty thousand dollars ($50,000), and said value does not exceed sixty thousand dollars ($60,000)." The trial court thereupon awarded to the plaintiff a life estate in the residence owned by the parties in Seattle, and awarded her $250

per month, beginning with the month of October, 1918, and continuing to the 20th day of March, 1920; and also required the defendant to deposit with the Bank of California, National Association, of Seattle, Washington, five railroad bonds of the par value of $1,000 each; that these bonds were to be held by the bank for a period of two years, the proceeds to be collected and paid to the plaintiff, and that, at the expiration of two years, the bonds themselves were to be delivered to the plaintiff for her sole use and benefit. The trial court also required the defendant to deposit with the Bank of California, during the year 1919, $4,000 in cash, to be invested in United States bonds for the benefit of the plaintiff, and to be held for a period of five years and then delivered to the plaintiff for her sole use and benefit. The court also required the defendant to deposit with the said bank, in the year 1920, the sum of $4,000 in cash, to be invested in bonds of the United States, and, at the expiration of eight years, to be delivered by the bank to the plaintiff for her sole use and benefit. The court also required the defendant to pay to the plaintiff $125 per month for the care and maintenance of an incompetent child of the parties; and, to secure this payment, required the defendant to deposit ten bonds of the par value of $1,000 each with the Bank of California, which bonds were to be returned to the defendant upon full performance of the obligation to support the child. The plaintiff has appealed from that decree, and insists that no divorce should have been granted to the defendant, and that the court should have awarded separate maintenance to the plaintiff.

The record is a voluminous one. The parties had been married for a period of nearly twenty-four years. They had an incompetent child which required constant care and attention because it was unable to care for

itself. For several years last past, the parties had not lived happily together. They had been separated at least once before, and many quarrels were detailed to the court. It is needless for us to enter into a discussion of the facts. We are convinced from an examination of the record that the trial court properly found that the appellant was quarrelsome and impatient with the respondent, and that such incompatibility of temperament exists between the appellant and the respondent that they can no longer live together as husband and wife. That being true, the court was fully justified in granting a divorce to the respondent.

The question of a proper division of the property, under the circumstances of the case, is not so easy of disposition. The trial court was evidently impressed with the fact that Mrs. Freeburn was very improvident in the use of money. He evidently thought it best to so arrange the property given to her that she could not use the principal immediately, but that it might be saved to her by placing it in the hands of a bank and the proceeds only given to her except at stated times. It was the opinion of the court that the dwelling house and the lots upon which it is located should be reserved for the use only of Mrs. Freeburn; that she should pay for the betterments, including taxes and assessments, and should have the use of the property during her lifetime; and that then it should descend to the child, or, in case of the death of the child, then to her heirs and to the heirs of Mr. Freeburn in equal shares. We think it is apparent that this dwelling-house may not be an asset for Mrs. Freeburn, for the upkeep and taxes and assessments which may hereafter be levied against it may cost more than the use of the property would be worth to her. We are of the opinion, therefore, that the trial court should have given the dwell-

ing-house and the lots upon which it is located to her in fee, that she may use it as she deems best.

At the trial of the case, it appeared that the property which the parties now own has been accumulated in the last four or five years. It appears that Mr. Freeburn has an advantageous contract with the Chicagoff Mining Company, operating in Alaska, by which he receives $200 per month as salary and seven and one-half per cent of the net dividends of that mine. These dividends, in the last four or five years, have yielded an income to Mr. Freeburn of something near $20,000 per year. This contract will expire in the year 1920. It is argued by the appellant that this contract may be renewed after the year 1920, and that Mrs. Freeburn should be entitled to a share of the proceeds of that renewal. It is mere speculation to suggest that this contract may be renewed upon the same or any terms whatever. But if it were to be renewed, it would be renewed long after this divorce and separation, and it is plain that the proceeds of such renewal would not be community property in any sense of the word. But we are of the opinion that, until the expiration of that contract in the year 1920, the proceeds are community proceeds, and that Mrs. Freeburn should share in those proceeds in addition to what the court has seen fit to award her. We are of the opinion, therefore, that the trial court should have awarded her one-half the proceeds of that contract, after the deduction of the income tax exacted by the United States, for the last year of its existence, and that this would be a fair division of the property of the parties under all the circumstances of the case.

The judgment of the trial court is therefore modified to the extent of giving the appellant the residence property in fee as her separate property, and one-half of the proceeds of the contract between Mr. Freeburn and

the Chicagoff Mining Company for the last twelve months of its existence. In all other respects, the judgment is affirmed.

Appellant also argues that she is entitled to a larger attorney's fee than was allowed by the court. We are satisfied that the court made a very liberal allowance on that issue, and we decline to disturb the judgment in that respect.

Appellant will recover her costs upon this appeal.

HOLCOMB, C. J., PARKER, and FULLERTON, JJ., concur.

[No. 15192. Department One. July 24, 1919.]

OKANOGAN POWER & IRRIGATION COMPANY, *Appellant*, v. E. C. QUACKENBUSH *et al.*, *Respondents*.[1]

TAXATION (142)—SALE—WHO MAY PURCHASE—CERTIFICATES OF DELINQUENCY. Under Rem. Code, § 2334, making it a misdemeanor for any public officer to be beneficially interested in any contract or purchase made by him, it is against public policy for a county treasurer, while in office, to purchase tax certificates of delinquency to be issued by his office; and a tax foreclosure thereon will be set aside, notwithstanding final steps to procure title were not taken until after his term of office had expired.

SAME (140)—SALE—NOTICE—"RECORD" OWNER. Notwithstanding a tax certificate foreclosure may be maintained against the owner named on the tax rolls, the county treasurer must, by the express provision of Rem. Code, § 9260, notify the "record owner" of the property of the pending sale; "record owner" being employed in its usual and common meaning.

Appeal from a judgment of the superior court for Okanogan county, Neal, J., entered July 31, 1918, dismissing an action for equitable relief, tried to the court. Reversed.

James B. Kinne, for appellant.

W. C. Gresham, for respondents.

[1]Reported in 182 Pac. 618.

TOLMAN, J.—Appellant, in 1908, acquired title from the state of Washington to a tract of land in Okanogan county, and has ever since been the record owner thereof. Shortly after purchasing, it subdivided and platted the lands as the Brewster Orchard Tracts, filed the plat of record, and proceeded to establish an irrigation system as an appurtenance thereto. The irrigated tracts were placed on the market, and the particular tracts here involved were sold on contract to different purchasers. Only one of these contracts was placed of record. The contracts all provided, among other things, that the purchaser should pay all subsequently accruing taxes. In the course of time, each of these purchasers defaulted, the several contracts were forfeited, and appellant again entered into possession and proceeded to cultivate the lands. Respondent Quackenbush, who was then the county treasurer of Okanogan county, in December, 1916, procured a considerable sum of money for the purpose of purchasing delinquent tax certificates to be issued by and through his office, made up a list of the taxes which he wished to pay, and his office force, under his direction, issued a considerable number of certificates of delinquency in the name of one B. S. Ladd, a brother-in-law of Quackenbush. But it is an admitted fact in the case that these certificates so issued, including those affecting the tracts of land here involved, were at all times the property of Quackenbush, purchased with his money, wholly under his control, and he was the only person to gain or lose by the transaction. These certificates show the owners or reputed owners of the tracts involved to be the purchasers under the contracts hereinbefore referred to. And it appears that the tax rolls showed such contract holders to be the owners, though it is alleged, and there is considerable evidence in the case to the effect, that Quackenbush

actually knew, or well might have known, that appellant was the owner and in possession of each of the tracts.

After his term of office expired, Quackenbush delivered these certificates to the prosecuting attorney with directions to foreclose, and such proceedings were had as to result in a foreclosure and sale thereunder by the county treasurer who succeeded him in office. The regularity of these proceedings is not attacked, except only for the failure to give appellant notice of the sale according to the language of the statute, Rem. Code, § 9260, which requires county treasurers to give notice to the record owner of the pendency of the sale. Appellant was not a party to the foreclosure, and had no notice or knowledge of the issuance of the certificates, or of any of the steps taken to acquire title thereunder, until after the delivery of the treasurer's tax deeds to Quackenbush; but, upon ascertaining the facts, it tendered to the county treasurer and to Quackenbush a sum of money sufficient to pay all taxes, interest, and penalties due, and all costs incurred up to the time of the tender. The tender being refused, appellant brought these actions, which were consolidated below, to require the county treasurer to receive and accept the amount due for taxes upon the property, to satisfy the lien of said taxes, and to set aside the tax deeds and quiet its title. From a judgment denying the relief sought, this appeal is taken.

May a county treasurer, while in office and charged with the duties thereof, become the purchaser of certificates of delinquency to be issued by his office? We said in *Coughlin v. Holmes,* 53 Wash. 692, 102 Pac. 772:

"Furthermore, we are of the opinion that the judgment may be sustained upon the ground that the sale of the land by the county treasurer to himself or a

deputy in his office is against public policy, and therefore invalid."

And the legislature has defined the public policy of this state by including in the criminal code the following:

"Every public officer who shall— . . .

"(2) Be beneficially interested, directly or indirectly, in any contract, sale, lease or purchase which may be made by, through or under the supervision of such officer, in whole or in part, or which may be made for the benefit of his office, or accept, directly or indirectly, any compensation, gratuity or reward from any other person beneficially interested therein . . .

"Shall be guilty of a gross misdemeanor, and any contract, sale, lease or purchase mentioned in subdivision 2 hereof shall be void." Rem. Code, § 2334.

It being against public policy for a public official to be beneficially interested in any contract, sale, lease, or purchase made through his office, it would seem almost too clear for argument that the acts complained of here come within the spirit, if not within the actual letter, of the prohibition. By the issuance of certificates of delinquency, the county sold its right to proceed against the property to collect the tax, contracted to repay the purchase money, with legal interest, if the certificates should prove to be void because of any irregularity of the taxing officers, and placed in the hands of the purchaser the instrument by which he might proceed in due course to procure title if the tax should not be paid. That the final steps in procuring title were not taken until after Quackenbush's term of office expired does not save the situation. If he must not buy the property at his own sale, he likewise may not initiate the proceedings, during his term, which will lead up to a purchase by him after his term has expired. We apprehend that it was the purpose of the legislature to forbid any public officer to in any

manner deal as an individual with the affairs of his office for the purpose of making a private profit. Such dealing is intolerable and cannot be permitted, directly or indirectly, immediately or remotely, and must be condemned wherever found, no matter what method be pursued.

While our views just stated dispose of the case, yet one other point, which has never been passed upon by this court, should be decided for the guidance of those charged with the duty or necessity of foreclosing certificates of delinquency. In Rem. Code, § 9260, relating to judgment and order of sale for taxes, is the provision:

"Provided, however, that before such sale shall be held, the county treasurer shall notify the record owner of such real estate of the pending sale, or in case of unknown owner shall post a notice of same in some public place at the county courthouse."

Nowhere else in the act are the words "record owner" used. Section 9254, Rem. Code, requires notice of the foreclosure suit to be served "upon the owner of the property described in such certificate." And we have frequently held that it was sufficient to name as defendant and serve with process the person in whose name the property appears on the tax rolls and who is named in the certificate as owner or reputed owner. See *Sparks v. Standard Lumber Co.*, 92 Wash. 584, 159 Pac. 812, and cases there cited. But notwithstanding the statutory provision that the suit may be maintained against the owner named in the certificate, who is the owner named on the tax rolls, the legislature, by the provision above quoted, has, in express terms, required a notice of sale to be given the record owner. In view of our recording act, there can be no doubt as to what is meant by the term record owner. And we think that, as the purpose of providing

for the issuance and foreclosure of certificates of delinquency is primarily to insure, if possible, the collection of the tax, and not to divest title except as a last resort, the legislature used the words "record owner" advisedly, with the purpose of making more certain the collection of the tax and reducing, so far as possible, the number of cases in which title would be divested. We can see no reason which will justify us in attempting to give the words "record owner" any other than their usual and common meaning.

The judgment appealed from is reversed, with directions to grant the relief prayed for.

HOLCOMB, C. J., MAIN, and MACKINTOSH, JJ., concur.

[No. 15216. Department One. July 24, 1919.]

R. L. SABIN, *Respondent*, v. C. W. SMITH, *Appellant*.[1]

BANKRUPTCY (7, 12)—DISCHARGE—EFFECT—FRAUDULENT TRANSFER. Where an insolvent debtor, with property subject to two mortgages, made fictitious deeds to relatives, procured a collusive foreclosure of the first mortgage under an agreement to pay the debt in installments and redeem at any time, and then went through bankruptcy, obtaining a discharge of personal liabilities to evade the second mortgage indebtedness, subsequently redeeming the title, he will be held in equity to have retained the property for the protection of the second mortgage and not for the purpose of defeating his rights; since there never was a bona fide sale or foreclosure.

Appeal from a judgment of the superior court for Franklin county, Truax, J., entered October 8, 1917, upon findings in favor of the plaintiff, denying an injunction to restrain the sale of real property on execution, tried to the court. Affirmed.

M. M. Moulton and *Gerard Ryzek*, for appellant.

M. L. Driscoll, for respondent.

[1]Reported in 182 Pac. 589.

MACKINTOSH, J.—In Kahlotus, the appellant and his brother, A. A. Smith, were engaged in the general mercantile business, and in the year 1909, A. A. Smith retired and the appellant continued in the business. On May 2, 1911, the appellant mortgaged the store property for $3,000, and on May 20, 1912, as security for various debts long past due, made a second mortgage to the respondent, who, on December 25, 1912, began foreclosure of this second mortgage, the final decree in which action was filed on July 18, 1913. On January 15, 1913, the appellant deeded the property to his brother, A. A. Smith, the consideration for this conveyance "was the satisfaction of debts owing A. A. Smith, for partnership notes collected by the appellant." At the same time, the appellant transferred his stock of merchandise to A. A. Smith, who took possession of the real estate and merchandise, which latter was subsequently taken by the creditors, and A. A. Smith removed from Kahlotus.

The deed to A. A. Smith provided that it was subject to both the first and second mortgages, and he assumed them and agreed to pay them. On September 24, 1913, the first mortgagees began an action to foreclose, making the respondent a party. A decree was entered, finding that the respondent's rights were inferior as being those of a second mortgagee. The property was sold and a certificate of sale was issued to the Connecticut Investment Company on April 22, 1914, this company being the agent of the first mortgagees. After the transfer by the appellant of his property to A. A. Smith, the appellant became insolvent and went to Canada. Some months later he returned and, with his mother-in-law, organized the Kahlotus Mercantile Company, of which he owned one share and she owned the remainder. This company then started up the business in the same location that the appellant and his

brother had formerly used. On March 10, 1914, this company entered into a contract with the Connecticut Investment Company whereby the latter company agreed to sell the property in controversy to the Kahlotus Mercantile Company. This agreement, made before foreclosure, was that redemption could be had by paying the mortgage indebtedness at any time, either before or after the statutory time of redemption, at the convenience of the appellant; the agreement being that the appellant was to pay off the debt at the rate of $80 per month. On May 28, 1914, the appellant was adjudged bankrupt, receiving his discharge in October, 1914. In July, 1914, the building upon the property burned, and the insurance was paid over to the Connecticut Investment Company and credited on the contract with the Kahlotus Mercantile Company. Later, in 1914, the Kahlotus Mercantile Company ceased business, its assets were divided, and in December, 1914, an assignment of the certificate of sale was made by the Connecticut Investment Company to the appellant, and the sheriff's deed to the property was made to the appellant in September, 1916. By the receipt of the insurance money by the first mortgagees or their agent, the entire first mortgage, together with costs, attorney's fees, and all charges, had been paid, and a surplus remained in the hands of the first mortgagees which was the property of appellant. In 1917, the respondent attempted to sell the real estate under execution on his judgment of foreclosure, and the appellant sought a temporary injunction to restrain that sale. Being unsuccessful in the lower court, he has renewed his application here.

The object sought by the appellant is to have annulled the mortgage which he placed upon his property and set aside the lien thereof, and to prevent the enforcement of his liability as mortgagor, and to free his

land from all liability under the covenants of his mortgage. After the respondent had begun the foreclosure action, the appellant began his efforts to accomplish the result which he seeks by this injunction. With the intent to relieve himself from his debt, he conveyed his property by fictitious deeds to his relatives, to be held by them for him, and procured the collusive foreclosure of his first mortgage upon the property here involved, on an agreement and understanding with the mortgagees, and made before the foreclosure action was begun, that the property could be redeemed by the appellant paying the mortgage indebtedness at any time, either before or after the statutory period of redemption. With the title to the property thus apparently disconnected from him, he then proceeded to have himself adjudicated a bankrupt, and wiped out his personal liability. With his record thus clear, he then secured his property back from his relatives and perfected his arrangements for a redemption from the first mortgagees. In September, 1913, the same month in which the foreclosure proceedings upon the first mortgage began, the appellant commenced to pay to the first mortgagees payments in part redemption of the property, under the arrangement that we have already noticed. While the foreclosure was in process, the appellant made payments, both before and after the execution sale, which payments, it is admitted, were intended to apply in redemption of the mortgage, and were applied by the mortgagees in partial satisfaction of the mortgage debt. While this mortgage was being foreclosed, the appellant gave his view of the arrangements with the mortgagees in these words:

"The Connecticut Investment Company hold first mortgage on store and are foreclosing to clear title, as there was a flaw in the title. I pay them $80 a month and they agree to release store as soon as I can get to

it. They give me five years to pay same. They also hold $900 first mortgage on 160 acres of land, and will also sell me that the same way. They told me to go ahead and farm it and then have the party who farmed same to file a lien on land for labor. Before the Portland people took judgment, I deeded the store A. A. and the land to Sidney Tuplin, who is in B. C. As I understand it, the judgment will not be against the land in that case, but against me."

The transfer to A. A. Smith was fictitious, and the appellant has at all times been the real owner of the property and has had possession thereof. The agreement between him and the first mortgagees was that the foreclosure was to have no effect as depriving him of his title. The foreclosure was merely used as a club to induce appellant to make more frequent and certain payments. During the foreclosure and after the execution sale, the position of the appellant and the mortgagees did not change, the latter simply held the land as security, being satisfied to accept payments from time to time in liquidation instead of pursuing the statutory method of requiring redemption.

Somewhere and somehow the appellant has conceived the idea that jugglery is a substitute for justice, and prestidigitation for payment, and in this court, with a seeming show of solemnity, argues that he can read his title clear. The appellant is correct in contending that the adjudication in bankruptcy cannot be collaterally attacked in this proceeding, but that adjudication merely discharged the appellant's personal liability and did not affect the mortgage lien. The researches of appellant's counsel have discovered two cases, one from Pennsylvania, *Rauch v. Dech*, 116 Pa. St. 157, 9 Atl. 180, 2 Am St. 598; and "an old Irish case," *In re Howard's Estate,* 29 L. R., Ireland, 266, which support his argument that the mortgagor of lands, who has sold his equity of redemption, and who

has been discharged in bankruptcy, if he then purchases a first mortgage on the lands, would be regarded as a stranger to the estate, and the equities of subsequent mortgagees will not be revived. We may concede that these two cases hold to this effect and that the rule is proper, whether held by those cases or not. The difficulty here is that they do not represent the situation with which we are dealing. The recital which has been made of the facts shows that the appellant, who says in his brief, "this is an equity action in which appellant seeks for equitable relief," cannot be held by us to be in the same position as one who, in good faith, has sold his equity of redemption in property, has then been discharged by proceedings in bankruptcy from personal liabilities, and then purchases a mortgage on the same lands. There never was, as a matter of fact, a *bona fide* sale or foreclosure, and the appellant, having retained the property, will be held to have done so for the protection of the respondent, his mortgagee, and not for the purpose of defeating his rights.

The trial court was correct in denying the injunction, and its action is affirmed.

HOLCOMB, C. J., TOLMAN, MITCHELL, and MAIN, JJ., concur.

[No. 15305. Department One. July 24, 1919.]

CHARLES FRISELL, *Appellant*, v. F. H. SURRY *et al.*, *Respondents*.[1]

MASTER AND SERVANT (172-174-1) — INJURY TO THIRD PERSONS — SCOPE OF EMPLOYMENT. A special watchman, employed to protect the property of patrons of an agency and night patrol system, acted outside of the scope of his employment, as a matter of law, when he left his beat and the property of his employers and entered upon a chase not connected with his work, to aid a regular police officer of the city, and shot and killed the person whom he was attempting to apprehend; and his employers, being in no way concerned in the affair, would not be liable for his act.

Appeal from a judgment of the superior court for King county, Ronald, J., entered September 23, 1918, upon granting a nonsuit, dismissing an action for wrongful death. Affirmed.

Robt. C. Saunders and *Israel Nelson*, for appellant.

Kerr & McCord, McClure & McClure, John F. Murphy, Earl G. Rice, and *E. L. Skeel*, for respondents.

TOLMAN, J.—This case was before this court on a former appeal from a judgment of dismissal based upon the plaintiff's opening statement to the jury. 99 Wash. 201, 169 Pac. 317. That judgment having been reversed, the case again proceeded to trial in the superior court, and at the close of plaintiff's evidence, the case was withdrawn from the jury and a nonsuit granted, upon the ground that the evidence submitted was insufficient to justify a verdict against all or any of the defendants then remaining in the case; from which judgment of nonsuit, this appeal is prosecuted.

The complaint, in substance, charges that the respondents were patrons of the F. H. Surry Agency and Night Patrol System, which was engaged in the

[1]Reported in 182 Pac. 604.

business of furnishing uniformed patrolmen, or private watchmen, to protect the business places of its patrons; that one Gouley was the agent, servant, uniformed patrolman and so-called operative of the F. H. Surry Agency, and, through that agency, was the agent and servant of respondents; and while so employed as such agent and servant, and in the course of his employment as such uniformed watchman of the properties of respondents, the said Gouley did, on or about the 19th day of September, 1915, wrongfully, negligently, and carelessly shoot and kill Carl Theodore Frisell, the minor son of appellant, then of the age of seventeen years, to his damage, etc.

The evidence shows that, at the time in question, each of the respondents was a patron of the Surry Agency, under an oral contract substantially the same in each instance, and to the effect that the agency would furnish an operative who would cover a certain district or beat in the nighttime and on holidays, visiting the business place of each patron at stated intervals, trying the doors, turning off the lights, and performing all of the usual duties of a night watchman; that this operative would be commissioned as a special officer, with power to make arrests, the same as a police officer, but would not be supposed to do police duty other than such as would be necessary in protecting the property of the patrons; that the operative would be uniformed and armed, after the manner of a regular police officer. It further appeared that Gouley was so uniformed and armed and had a commission as special deputy sheriff, such as is issued to peace officers, and was covering a beat in the city of Seattle which extended from Pine street on the north to Union street on the south, and easterly to Sixth avenue. At about one o'clock on the night in question, Gouley was standing on Third avenue just south of Pine street, in the company of a regu-

lar police officer, when two young men approached and complained to them that a gang, referred to as the motorcycle gang, had assaulted and beaten them near Second avenue and Pine street. Gouley and the officer proceeded to Second avenue and Pine street, received information that the gang had gone to the vicinity of Fourth avenue and Pine street, and thereupon Gouley and the officer proceeded in different directions, meeting again at Fourth avenue and Pine street without finding the offenders. They were there joined by another officer, and at about that time a rider on a motorcycle was seen approaching. The rider failed to stop upon the order of the officer; and one of the officers flagged a passing automobile and he and Gouley, mounting upon the running-board upon either side of the car, gave chase to the fleeing rider; but after proceeding some distance, it became apparent that the rider was outstripping them, and the officer fired two or three shots into the air. This, however, failed to stop the rider, and the trail being lost, the automobile with Gouley and the officer returned toward the center of the city. Going westerly on Pine street near Eighth avenue, they saw two boys on a motorcycle facing east on Pine street; the officer, saying "there they are," jumped off the automobile, but Gouley remained on the car, continuing on Pine street to Sixth avenue, thence south to Pike street, and east on Pike street to Seventh avenue, where they turned north. At this point a motorcycle appeared in Seventh avenue a short distance north of Pike street, headed toward the south. Gouley jumped from the automobile, ordered the riders of the motorcycle to halt, but instead of obeying the order, the motorcycle was swung around in a circle and started north on Seventh avenue. Gouley then fired several shots, one of which killed appellant's son, who was the rear rider on the motorcycle.

It does not appear that the victim of this tragedy was guilty of any offense whatever, or that there was any justification for the shooting. But however unnecessary and lamentable the act, we can discover nothing in the evidence in any manner tending to show, or from which the jury might properly draw the inference, that it was committed by Gouley in the course of his employment to protect the property of respondents. At no time was there any complaint that any of the supposed offenders was committing or attempting to commit, any form of depredation upon the property of any of the patrons of Gouley's employer. And no such act appears to have been feared by Gouley, who deliberately stepped outside the scope of his employment, left his beat and the property of respondents without the protection which his presence and attention to duty were supposed to give, and entered upon a chase with the regular police officer of the city, in which his patrons were in nowise concerned, and which, as they were advised, he was supposed not to do. Clearly these facts, and all reasonable inferences which may be drawn therefrom, all point to one conclusion, and reasonable men cannot differ as to that conclusion. Hence there was no question to be submitted to the jury, and the court may here say, as a matter of law, that Gouley was not acting within the scope of his employment when he fired the fatal shot. So that, even though it should be held that the evidence justified the submission to the jury of the question as to whether or not respondents had such power or control over Gouley as to invoke the rule of *respondeat superior,* which may well be doubted, still the judgment of the trial court was right, because, as a matter of law, from the undisputed evidence, and all reasonable inferences to be drawn therefrom, Gouley was not acting within the scope of his employment.

We have no quarrel with the law laid down by the authorities cited by appellant. Yet the facts in this case, as we see them, render such authorities inapplicable. More nearly in point, and fully sustaining and illustrating our views as herein expressed, are the following: *Philadelphia, B. & W. R. Co. v. Stumpo,* 112 Md. 571, 77 Atl. 266; *Buman v. Michigan Cent. R. Co.,* 168 Mich. 651, 134 N. W. 972, Ann. Cas. 1913D 107; *Hidalgo v. Gulf, C. & S. F. R. Co.* (Tex. Civ. App.), 128 S. W. 683; *Holler v. Ross,* 68 N. J. L. 324, 53 Atl. 472, 96 Am. St. 546, 59 L. R. A. 943; *St. Louis, I. M. & S. R. Co. v. Sims,* 106 Ark. 109, 152 S. W. 985, 44 L. R. A. (N. S.) 1156; *Kehoe v. Marshall Field & Co.,* 141 Ill. App. 140.

The judgment appealed from is affirmed.

HOLCOMB, C. J., MAIN, MACKINTOSH, and MITCHELL, JJ., concur.

[Nos. 15417, 15418. Department One. July 24, 1919.]

THE STATE OF WASHINGTON, *on the Relation of E. L. French, Plaintiff*, v. C. W. CLAUSEN, *as State Auditor, Respondent.*

THE STATE OF WASHINGTON, *on the Relation of Pliny L. Allen, Plaintiff*, v. C. W. CLAUSEN, *as State Auditor, Respondent.*[1]

CONSTITUTIONAL LAW (3)—CONSTRUCTION. The provisions of the constitution are to be construed in the common and natural view, to determine, if possible, the intention of the law makers.

OFFICERS (2)—WHO ARE OFFICERS. A member of the industrial code commission created by Laws 1919, p. 566, holds a civil office, within Const., art. 2, § 13, prohibiting the appointment or election of any member of the legislature, during the time for which he is elected, to any civil office created during his term; the commission having power to make investigations, hold hearings, and make reports to the legislature as to the evils existing in industrial life, each member receiving compensation for each day's services in addition to expenses.

STATUTES (9)—PARTIAL INVALIDITY. The invalidity of the provision in Laws 1919, p. 566, creating the industrial code commission, that two of its five members must be members of the legislature, does not affect the validity of the balance of the act or prevent the Governor from appointing some other citizens who are eligible.

Applications for writs of mandamus, filed in the supreme court June 18, 1919, to compel the state auditor to issue warrants in payment of expenses incurred by the industrial code commission. Granted as to one application; denied as to the other.

W. V. Tanner, for relators.

The Attorney General and *John H. Dunbar*, for respondent.

MITCHELL, J.—These two causes, being so nearly alike, may be properly considered in one opinion.

[1]Reported in 182 Pac. 610.

Chapter 184, Laws of 1919, p. 566, provides that the governor shall appoint a commission of five citizens of the state, one of whom shall be a member of the senate and one a member of the house of representatives of the legislature of 1919, to be known as the "Industrial Code Commission." The act provides that each commissioner shall receive compensation of ten dollars ($10) for each day actually employed in the work of the commission, and shall be allowed necessary expenses incurred in the performance of his duties. The duty of the commission is defined in § 2 of the act as follows:

"It shall be the duty of the industrial code commission to investigate the evils existing in industrial life and the means and methods of remedying the same, and to prepare and present to the legislature of the state of Washington at its next regular session a proposed act, or acts, upon all such subjects, including an act for the prevention of strikes, lockouts and boycotts, and the orderly settlement of industrial disputes."

Further, the act empowers each of the commissioners to administer oaths and to issue subpoenas for the attendance of witnesses and the production of books and papers in any inquiry, and provides that witnesses shall be entitled to fees and mileage; and an appropriation of twenty-five thousand dollars ($25,000) out of the general fund of the state is made for the purpose of carrying out the provisions of the act. In making up the industrial code commission, pursuant to the terms of the law, the governor appointed Honorable E. L. French, a member of the legislature of 1919, relator in cause No. 15417, as one of its members. Upon the organization of the commission, he attended one of its meetings, and necessarily expended, in the way of personal expenses, the sum of six dollars and fifty-four cents ($6.54); and, although proper vouchers

for his compensation and expenses were presented to respondent, as state auditor, and demand made for the issuance and delivery of a warrant in payment thereof, the respondent refused to issue a warrant for such sum, or any part thereof. Application is made for a peremptory writ of mandamus commanding respondent to issue and deliver such warrant.

Concerning the other cause, No. 15418, after the commission was organized, it purchased and received from Pliny L. Allen, relator, one filing cabinet of the agreed value of eighty-five dollars ($85), for the use of the commission in the performance of its duties; and, although a proper voucher for the sum was presented to respondent, as state auditor, and demand made for the issuance and delivery of a warrant therefor, respondent refused to issue the same. Application is made for a peremptory writ of mandamus commanding respondent to issue and deliver such warrant. To the petition in each case, respondent has filed a general demurrer, which presents the question of the validity of the act creating the commission, and particularly of that part of it relating to the appointment of members of the legislature of 1919, as coming in conflict with § 13, art. 2, of the state constitution, as follows:

"No member of the legislature during the term for which he is elected shall be appointed or elected to any civil office in the state which shall have been created, or the emoluments of which shall have been increased, during the term for which he was elected."

On the contrary, relators contend the act does no violence to any provision of the constitution. They say it does not contravene the particular section of the constitution relied on by respondent, because appointment to membership upon the industrial code commission is not appointment to a civil office; and relator Allen further contends that, conceding the provision relating to

appointment of members of the legislature to be invalid, such provision may be ignored and the remainder of the act permitted to stand. Confining the inquiry solely to the effect of § 13, art. 2, of the constitution upon the act, it would follow that, if relators are right in the first contention, then each of them would be entitled to the writ applied for; but if it be determined that the only available contention interposed is the further one made by relator Allen, then he only would be entitled to the writ.

It is not claimed the act does not create a civil office, as contradistinguished from a military or other kind of office, but that the act does not create an office at all in the sense in which the word is used in the particular provision of the constitution. The difficulty of formulating a definition of the word "office," at once precise, comprehensive and exclusive, must be considered as well-nigh insuperable. The definitions of the word, as given by the text writers and courts, are not in entire harmony. Such situation, however, proceeds not so much from any conflict of opinion as it does from diversified points of view. Concerning a difficulty somewhat similar, while writing of the Federal constitution as bearing upon the validity of a legislative act, the chief justice in the famous case of *McCulloch v. Maryland,* 4 Wheat. (17 U. S.) 316, 414, said:

"Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; . . . Almost all compositions contain words which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended."

Counsel for relators calls attention to a number of general definitions of the word "office," as given by the authorities, in the light of which he contends the position as a member of the commission is not an

office. With one exception we take no occasion to enumerate or analyze those cases; for certainly the important thing here is not to ascertain some general definition of the term "office," but its meaning in the sense in which it is used in § 13, art. 2, of the constitution. The exception we make refers to the case of *Mulnix v. Elliott,* 62 Colo. 46, 156 Pac. 216, which relators claim is in point. The court had under consideration in that case an act of the general assembly providing for the appointment of a board of seven members to be known as the "Survey Committee of State Affairs," consisting of two senators, one of whom should be the president of the senate and one to be appointed by the president of the senate; two representatives, one of whom should be the speaker of the house and one appointed by the speaker of the house; and three citizens not members of the legislature, appointed by the governor. The act made it the duty of the committee to study the state institutions, boards and departments with a view of making recommendations for securing greater economy and efficiency in state government, among other ways, by reporting, from time to time, its findings and recommendations to the governor, who, in turn, should submit the same, together with his recommendations, to the next regular session of the legislature for any desirable legislation. No compensation was provided for the members of the committee, but an appropriation of one thousand dollars ($1,000) was made to pay their actual expenses while engaged in the work. After the committee was organized, one of its members, a state senator, instituted the action to compel the state auditor to issue to him a warrant for personal expenses incurred as a member of the committee. The court in its decision called attention to art. 3 of the constitution of Colorado, dividing the powers of government into the legis-

lative, executive and judicial, and prohibiting a person charged with the exercise of powers belonging to one department from exercising those belonging to either of the others, except as in the constitution expressly directed or permitted; and also noticed § 8, art. 5, of the Colorado constitution, viz.: "No senator or representative shall, during the time for which he shall have been elected, be appointed to any civil office under this state"; both of which provisions were relied on by the state auditor. The analysis of the act given by the court is devoted solely to the ascertainment if the act conferred any executive powers upon the committee, at the conclusion of which it is simply said of the act: "It does not violate either of the constitutional provisions invoked." The opinion was by a divided court, three of the seven judges dissenting.

For our present purpose, we find no help in the Colorado case, for the reason that, in the opinion, the court, after stating the contentions of the state auditor to the effect, first, if the committee be regarded as a joint legislative committee, the act was void, being in conflict with the article of the constitution upon the subject of the distribution of powers, in that the duties and powers attempted to be conferred by the act were executive and not legislative; and second, if regarded as creating not a legislative committee but an executive commission, the act violated the provisions of the constitution precluding a member of the legislature from holding any other civil office in the state during the time for which he had been elected, immediately and specifically stated: "In considering these propositions it is therefore only necessary to determine, and all we do determine, is whether the duties imposed and powers conferred upon the committee by the act are executive."

Statutes are enacted by legislators of experience, or at least by persons of affairs, while in the enactment of a constitution the public are the legislators. Unless otherwise provided, precision may be exacted in determining the meaning of the language of a statute, while generally, in the case of a constitution, its provisions should be construed in the common and natural view; always the most important thing being to determine, if possible, what the real intention of the lawmakers was. Discussing the subject, this court, by Judge Dunbar, in the case of *State ex rel. Chamberlin v. Daniel,* 17 Wash. 111, 49 Pac. 243, quoted with approval as follows:

" 'A constitution,' says Mr. Endlich in his Interpretations of Statutes, § 526, 'is intended for the benefit of the people and must receive a liberal construction.' 'The principle of strict construction would frustrate important provisions in every newly constructed frame of government.' Such is the general rule, the keynote, as it were, of all interpretation of constitutional provisions, and is in harmony with the principles already discussed.' "

Section 13, art. 2, of the constitution does not prohibit a member of the legislature, during the term for which he was elected, from being appointed or elected to office, generally, in the state. The preclusion extends only to any office which shall have been created, or the emoluments of which shall have been increased, during the term for which he was elected. Of course, the purpose of the rule is obvious. It is as was stated in *Fyfe v. Kent County Clerk,* 149 Mich. 349, 112 N. W. 725, in construing a similar constitutional provision, as follows:

"The purpose of these provisions is 'to preserve a pure public policy,' or, as we said in *Ellis v. Lennon,* 86 Mich. 468, speaking through Justice McGrath, 'to prevent officers from using their official position in the

creation of offices for themselves or for the appointment of themselves to place.' ''

The commission is created by, and its members derive their powers from, an act of the legislature. The term of service is fixed. It uses the process of the state to compel the attendance of witnesses and the production of books and papers. Its members administer oaths. It has at its disposal twenty-five thousand dollars ($25,000) of the state's money for carrying out the purposes of the act. On behalf of the state, of its own independent motion and will, it makes investigations and holds hearings within the state when, where and for whatever length of time it pleases. Its defined duties are under the direction and control of no superior. And each member, in addition to his expenses, receives compensation for each day's actual service.

In oral argument counsel for relators interestingly called attention to the wisdom of that plan of the act by which advantage to the state would be greatly increased in having as a member of the legislature, when it considers an act or acts proposed by the commission, one who was a member of the commission, as would happen in the event a member of the commission were a member of such session of the legislature. There is force in the argument that one who had listened to the details of the inquiries of the commission and of the information it had received would be already familiar with the subject and of peculiar and signal help to other legislators in the final shaping of contemplated legislation. But these considerations go only to the propriety, or lack of it, in the constitutional provision in question as it is written. Most any rule has its disadvantages as well as its virtues. To be persuaded by the argument of counsel would induce the writing of an exception to the rule in the constitution. On the contrary, it must be held that, in adopting the

provision referred to, the makers of the constitution preferred to forego some advantages that might flow from some exception to the rule, rather than risk manifest evils which would be obviated by enforcement of the rule without any exception or qualification. We are of the opinion that membership in the industrial code commission comes within the term "office" as used in this provision of the constitution, and that the relator is not eligible thereto—this according to both the spirit and the letter of the law.

Other than the one just discussed, there is no objection to the validity of the act. The provision found to be unenforcible because of the ineligibility of a member of the legislature to membership on the commission must be considered as directory and easily separable from the remainder of the law without affecting its validity. Manifestly, one of the dominant ideas of the act concerning the membership of the commission is that "the governor shall appoint a commission, consisting of five citizens of the state of Washington," and if, by reason of a deep interest in the important subject-matter, the legislature suggests a rank or class denied by the constitution from which a member of the commission should be chosen by the appointive power, such situation will in no sense deprive the governor of the right and power to appoint some other citizen of the state, eligible to be a member of the commission, instead of the one determined to be ineligible.

It results from the foregoing that the writ applied for in cause No. 15417 should be, and it is, denied; also that the writ applied for in cause No. 15418 should be, and it is, granted.

HOLCOMB, C. J., MAIN, MACKINTOSH, and TOLMAN, JJ., concur.

[No. 15097. Department One. July 29, 1919.]

ERNST HUSCHKE, *Respondent*, v. ARCADIA ORCHARDS COMPANY, *Appellant*.[1]

WATERS AND WATER COURSES (98) — IRRIGATION — CONTRACT FOR WATER—PERFORMANCE. An irrigation company's contract to deliver water is not breached where it was ready to deliver the water, but the owner had failed to designate any point for delivery and had not prepared his land to receive it.

SAME (102)—DAMAGES (117)—EVIDENCE—SUFFICIENCY. Damages for failure to furnish water for irrigating an orchard cannot be left to speculation and conjecture, and a verdict without definite proof cannot be sustained.

Appeal from a judgment of the superior court for Spokane county, Wright, J., entered April 8, 1918, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Reversed.

Lee & Kimball, and *Cullen, Lee & Matthews*, for appellant.

Charles Grant, for respondent.

MACKINTOSH, J.—In *Huschke v. Arcadia Orchards Co.*, 89 Wash. 423, 154 Pac. 800, will be found a prior decision of this case, which remanded it for a new trial. The facts are set forth in the former opinion, and it is therefore unnecessary to refer to them here. Upon the new trial, which resulted in a favorable verdict for the respondent, evidence was introduced as to what would be a reasonable time to be afforded the appellant in which to furnish the supply of water called for in the contract. Evidence was also introduced tending to show that the appellant had furnished such water at the place designated, but that respondent had made no attempt to take the water nor had he prepared his land

[1]Reported in 182 Pac. 593.

for its reception. In *Pasco Reclamation Co. v. Rankert*, 73 Wash. 363, 131 Pac. 1143, we said:

"The evidence fairly shows that the only reason the water has not been delivered to the appellant is because of his failure to designate any point from which he desires to take water, and his failure to construct the necessary conduit thence to his land, as he agreed to do. The respondent can do no more than he has done until the appellant signifies where and how he desires to take the water."

The measure of damages, as established by this court in the former appeal, was the difference between the value of the trees with water and their value without the same. The respondent introduced no definite proof of such damage, and left the jury to arrive at the amount thereof by speculation and conjecture. The entire record is such that no facts were properly submissible for the jury's consideration, and the verdict returned by it must fall for the reason that it is without supporting evidence.

Judgment reversed.

HOLCOMB, C. J., MITCHELL, MAIN, and TOLMAN, JJ., concur.

[No. 15172. *En Banc.* July 29, 1919.]

ROBERT OSTHELLER, *Administrator etc., Respondent,* v. SPOKANE & INLAND EMPIRE RAILROAD COMPANY, *Appellant.*[1]

DEATH (9)—RIGHT OF ACTION—DEFENSES—CONTRIBUTORY NEGLIGENCE OF DECEASED. Rem. Code, § 183, giving to heirs a right of action for the death of a person caused by the "wrongful act or neglect" of another, refers to wrong or neglect as against the deceased; hence no recovery is given where the deceased was guilty of contributory negligence.

HUSBAND AND WIFE (86, 87)—COMMUNITY PROPERTY—RIGHT OF ACTION—PERSONAL INJURIES—DEFENSES. The community of husband and wife being a legal entity in which title to property acquired is vested, the right of recovery for personal injuries is in the community alone and the contributory negligence of the husband is the negligence of the community.

DEATH (9)—RIGHT OF ACTION—DEFENSES—CONTRIBUTORY NEGLIGENCE OF DECEASED. In an action for wrongful death, the contributory negligence of the husband, resulting in the instantaneous death of both husband and wife, is the contributory negligence of the community and hence precludes recovery by the heirs for wrongful death of the wife as well as the husband.

TOLMAN, J., dissents.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered May 14, 1918, upon the verdict of a jury rendered in favor of the plaintiff, in an action for wrongful death. Reversed.

Graves, Kizer & Graves, for appellant.

Tustin & Chandler, for respondent.

PARKER, J.—This is an action to recover damages for the death of Ferdinand and Minnie Ostheller, husband and wife, alleged to have been caused by the wrongful act, to wit, the negligence, of the defendant railroad company. While the death of Mr. and Mrs. Ostheller occurred at the same time as the result of a single

[1]Reported in 182 Pac. 630.

alleged wrongful act of the company, and recovery therefor was sought in the superior court in this one action, such recovery was sought in two causes of action separately pleaded in one complaint, the allegations of which separate causes of action were in substance the same, except as to the person whose death was so occasioned, damages being claimed by the administrator in behalf of the heirs of the deceased, in the first cause of action, for the death of Mr. Ostheller, and in the second cause of action, for the death of Mrs. Ostheller. A single trial of both causes of action upon the merits in the superior court for Spokane county sitting with a jury, resulted in a verdict in favor of the company, denying recovery for the death of Mr. Ostheller, and a verdict in favor of the administrator, awarding recovery for the death of Mrs. Ostheller. Judgment was rendered accordingly. The railroad company has appealed from that portion of the judgment awarding recovery for the death of Mrs. Ostheller.

Our problem, as we view it, calls for but a brief summary of the controlling facts. The Osthellers, for about four years immediately preceding their decease, lived in the southern part of Spokane county, some twenty miles south of the company's electric railway line, which runs east from the city of Spokane. At the time of their decease, they were returning to their home in their automobile, having been on a trip to the northern part of the county merely to see the country, and incidentally to purchase and take home in their automobile some vegetables, as opportunity therefor might offer. As they approached the crossing of the company's tracks at the little station of Flora, Mr. Ostheller driving the automobile, one of appellant's trains also approached the crossing from the east at a high rate of speed. As they came upon the crossing,

their automobile was struck by the appellant's fast moving train, resulting in the practical destruction of their automobile, and also the death of both of them, all of which occurred as nearly instantaneously as effect could follow cause under such circumstances. Appellant denied negligence upon its part, and also set up the defense of contributory negligence on the part of Mr. and Mrs. Ostheller in the driving of their automobile upon the crossing without heeding the approach of the train, which the company asserted was in plain view of them in ample time for them to stop their automobile and avoid being injured. We shall assume for present purposes that the evidence was such as to call for the submission of the question of contributory negligence to the jury, though it is strenuously argued in behalf of the company that it should have been decided, as a matter of law, that the defense of contributory negligence was sufficiently proven to warrant the taking of the case from the jury and deciding it in favor of the company. Both defenses were submitted to the jury by the trial court by its instructions. The verdict of the jury, denying recovery for the death of Mr. Ostheller and awarding recovery for the death of Mrs. Ostheller, renders it plain that the jury found that, while the company was negligent, Mr. Ostheller's contributory negligence was such as to prevent recovery for his death, but that his contributory negligence was not such as to prevent recovery for Mrs. Ostheller's death, and that she, individually, was not guilty of contributory negligence.

This action was commenced and prosecuted by the administrator of the estate of Mr. and Mrs. Ostheller, in behalf of their children, under Rem. Code, § 183, which, insofar as we need here notice its language, reads as follows:

"When the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death."

It is here contended by counsel for the company that the contributory negligence of Mr. Ostheller, established by the verdict, preventing recovery for his death, prevents recovery for the death of Mrs. Ostheller; and that the trial court erred in declining to so decide, as a matter of law, in denying the motion, timely made in behalf of the company, for judgment notwithstanding the verdict awarding recovery for the death of Mrs. Ostheller.

We regard it as well settled law that, while this is not a statute providing for the survival of a cause of action possessed by the deceased for recovery for injuries resulting in his death, but is a statute giving to the heirs a new right of action not recognized by the common law, it nevertheless gives a right of action to the heirs of the deceased which is dependent upon the right the deceased would have to recover for such injuries up to the instant of his death. In other words, dependent upon the right of the injured person to maintain an action for the damage resulting from his injury, had he survived. And this, we think, is the law governing the rights of the heirs, whether the statute expressly so provides or not. It appears that the original Lord Campbell Act did so provide in express terms, as does several of the state statutes of this country; while our statute, above quoted, those of the several states, and the Federal employers' liability act, do not so provide in express terms. The words "wrongful act or neglect," used in statutes of this nature in defining the quality of the act causing the injury and death, it seems to be universally agreed by the courts, mean wrong or neglect as against the deceased; that is,

in the sense that the deceased could have recovered damages for the injury resulting in his death. In Tiffany, Death by Wrongful Act (2d ed.), § 63, that learned author states the rule as follows:

"An essential limitation upon the words 'wrongful act, neglect, or default' is created by the provision that they must be such as would have entitled the party injured to maintain an action therefor. This provision makes it a condition to the maintenance of the statutory action that an action might have been maintained by the party injured for the bodily injury. The condition has reference, of course, not to the loss or injury sustained by him, but to the circumstances under which the bodily injury arose, and to the nature of the wrongful act, neglect, or default; and, although this condition has not been expressed in California, Idaho, Kentucky, and Utah, no case has been found in which it has not been implied.

"A preliminary question arises, therefore, in every action for death, namely, was the act, neglect, or default complained of such that if it had simply caused bodily injury, without causing death, the party injured might have maintained an action?"

In *Northern Pac. R. Co. v. Adams,* 192 U. S. 440, the supreme court of the United States had under consideration the statute of Idaho, in substance the same as ours above quoted, in so far as our present inquiry goes, which statute, like ours, contained no express provision making the right of the heirs dependent upon the right of the deceased to recover for the injury resulting in his death, had he survived. Justice Brewer, speaking for the court, following some preliminary observations, said:

"The two terms, therefore, wrongful act and neglect, imply alike the omission of some duty, and that duty must, as stated, be a duty owing to the decedent. It cannot be that, if the death was caused by a rightful act, or an unintentional act with no omission of duty owing to the decedent, it can be considered wrongful

or negligent at the suit of the heirs of the decedent. They claim under him, and they can recover only in case he could have recovered damages had he not been killed, but only injured. The company is not under two different measures of obligation—one to the passenger and another to his heirs. If it discharges its full obligation to the passenger his heirs have no right to compel it to pay damages."

In *Michigan Cent. R. Co. v. Vreeland,* 227 U. S. 59, Ann. Cas. 1914C 176, the supreme court of the United States had under consideration the provision of the Federal employers' liability act of 1908, which provision is, in substance, a death by wrongful act statute of the same import as our statute, there being no express provision in that act making the right of recovery dependent upon a right of action in the deceased for the injuries resulting in his death. Justice Lurton, speaking for the court, after some preliminary observations recognizing that, by the act, a new right of action was created not sanctioned by the common law, and that it was not a statute providing for the survival of a right of action possessed by the deceased, among other things, said:

"But as the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury."

See, also, 8 R. C. L. 745; and 17 C. J. 1184, 1200, and cases there cited.

The decision of this court in *Brodie v. Washington Water Power Co.,* 92 Wash. 574, 159 Pac. 791, holding that a settlement and release of damages for personal injuries by the injured person bars an action by his heirs under this statute, following his death resulting from the injury, supports this view of the law. The

conclusion reached in that case must manifestly rest upon the theory that statutes of this nature give a right of action to the personal representatives of the deceased only when the deceased might have successfully maintained an action to recover damages for the injury resulting in his death, and that all defenses available to the defendant, if the action had been brought by the person injured, prior to his death, are available to the defendant in an action brought by his personal representatives to recover damages for his death. 8 R. C. L. 778. Manifestly the defense of contributory negligence is as available to the defendant as the defense of settlement and satisfaction by the deceased before his death. Both equally take away the right of the deceased to successfully maintain an action for his injuries. *King v. Henkie,* 80 Ala. 505, 60 Am. Rep. 119.

Our problem then is, was the contributory negligence of Mr. Ostheller, in law, the contributory negligence of the legal entity that was, in a legal sense, originally damaged by the injuries which resulted in the death of Mr. and Mrs. Ostheller? If that legal entity was the community consisting of Mr. and Mrs. Ostheller, and not Mrs. Ostheller as an individual, it would seem to follow, as we shall presently notice, that his contributory negligence was, in law, its contributory negligence, such as would prevent recovery by it had it sought recovery before its dissolution; and, in turn, would prevent recovery by the administrator. If Mrs. Ostheller was, in a legal sense, individually damaged by the injuries which resulted in her death, that is, damaged in the sense that she could, in her separate right, have maintained an action to recover damages for such injuries prior to her death, it would seem to follow that Mr. Ostheller's contributory negligence

would not be imputed to her, as a matter of law, merely because of their domestic relationship.

The community of husband and wife is, under our laws, a legal entity in which the individuality of both spouses is merged, in so far as ownership of property acquired by either after marriage is concerned, subject to certain exceptions of no moment in our present inquiry; and the title to property so acquired vests in such legal entity. Rem. Code, §§ 5915-5917; *Holyoke v. Jackson,* 3 Wash. Terr. 235, 3 Pac. 841; *Brotton v. Langert,* 1 Wash. 73, 23 Pac. 688. The husband has the management and control of the community personal property, even to the extent of the power of disposition thereof as he has of his separate personal property, except he cannot devise by will more than one-half thereof. Rem. Code, § 5917. This control goes to the extent that the wife cannot even sue, except by joining her husband as plaintiff, to recover damages for personal injuries suffered by her alone; and even then she is not a necessary party plaintiff, because of the husband's management and control of the community personal property and the fact that such right of recovery is in the community alone. *Hawkins v. Front Street Cable R. Co.,* 3 Wash. 592, 28 Pac. 1021, 28 Am. St. 72, 16 L. R. A. 808; *Davis v. Seattle,* 37 Wash. 223, 79 Pac. 784; *Matthews v. Spokane,* 50 Wash. 107, 96 Pac. 827; *Maynard v. Jefferson County,* 54 Wash. 351, 103 Pac. 418; *Schneider v. Biberger,* 76 Wash. 504, 136 Pac. 701.

These considerations, we think, compel the conclusion that the right of the administrator to recover in this action for the death of Mrs. Ostheller depends upon the existence of a right of recovery in the community consisting of Mr. and Mrs. Ostheller for the injuries received by Mrs. Ostheller, following the injury up to the time the community was dissolved by

death. Now if recovery for the injuries resulting in Mrs. Ostheller's death had been sought in an action before the community's dissolution, manifestly such recovery could not have been sued for by Mrs. Ostheller in her individual capacity. Such recovery would necessarily have been sought in an action in which Mr. Ostheller would have been plaintiff, in behalf of the community, or in which, even if both had been named as plaintiffs, the action would have been in behalf of the community. It would not then have been a question of Mr. Ostheller's contributory negligence being the contributory negligence of Mrs. Ostheller individually, but it would have been a question of his contributory negligence being the contributory negligence of the community; and his contributory negligence being established in such case, as it was in this, we are unable to see how the conclusion could be avoided that the community's recovery would have been thereby defeated. Had Mr. Ostheller, by his negligent driving of the community automobile upon this family pleasure trip, injured some third person, it could not be successfully contended that the liability in damages therefor would not have rested upon the community, since manifestly he was driving the automobile for the community. It seems to us equally clear that, if the community had survived and was here seeking recovery for the damages which in law it suffered by the injuries received by Mr. and Mrs. Ostheller, his contributory negligence would have prevented recovery by the community. Just as his negligence in the one case would be the negligence of the community, so would his contributory negligence in the other be the contributory negligence of the community. *Crevelli v. Chicago, Milwaukee & St. Paul R. Co.*, 98 Wash. 42, 167 Pac. 66, L. R. A. 1918A 206; *McFadden v. Santa Ana, O. & T. St. R. Co.*, 87 Cal 464, 25 Pac. 681, 11 L. R. A. 252.

We have not lost sight of the fact that Mr. and Mrs. Ostheller died as the result of the same catastrophe, and that their death followed their injuries then received as quickly as death could follow injury; in other words, as quickly as effect could follow cause, under such circumstances. But we think there is no escape from the conclusion that both were injured at the same time, and that both thereafter died from the effect of such injuries. There was necessarily some space of time between the receiving of the injuries and the death of either of them; that is, between the time of the receiving of the injuries and the dissolution of the community. During that period, however brief, the company became liable in damages to the community for such injuries as it may have negligently caused, or it never became liable to any one for the result of the collision of its train with Mr. and Mrs. Ostheller's automobile. This is the right of action against the company which must first be shown to exist before it can be said there accrued any right of action in favor of the administrator because of the death of Mr. and Mrs. Ostheller. It is the preliminary question which arises in every case wherein recovery is sought under statutes of this nature, as expressed in the above quoted language from Tiffany, Death by Wrongful Act.

There are decisions of the courts holding that, in actions under statutes of this nature, where the recovery is sought for the death of the wife, the contributory negligence of the husband causing the original injury will not defeat recovery by her representatives for her death. But we think it will be found that those decisions are from jurisdictions where the injured wife has the right to recover damages for injury to her person in her separate right, under statutes which do not result in the merging of her individuality, so far as her

marital property rights are concerned, in the husband as at common law, or in the community as under our law. Under the law of these jurisdictions, the wife's personal separate right of action comes into existence immediately upon her being injured. Hence there is furnished the condition upon which a right of action by her representatives for her death can rest. We see no escape from the conclusion that the contributory negligence of Mr. Ostheller, established and found by the jury in this case, must be held to defeat the right of recovery by the administrator for Mrs. Ostheller's death, under this statute.

The judgment is reversed, and the action dismissed.

HOLCOMB, C. J., FULLERTON, MACKINTOSH, MAIN, and MOUNT, JJ., concur.

TOLMAN, J., dissents.

[No. 15236. Department One. July 29, 1919.]

THE STATE OF WASHINGTON, *Respondent*, v. W. G. EMONDS, *Appellant*.[1]

INTOXICATING LIQUORS (26)—REGULATION — PHYSICIANS — UNLAWFUL PRESCRIPTIONS—STATUTES—VALIDITY. Rem. Code, § 6262-8 providing that it shall be unlawful for a physician, after he has been twice convicted of violating the prohibition law, to thereafter write any prescription for intoxicating liquor, is a valid exercise of legislative power.

CRIMINAL LAW (452, 453)—APPEAL—HARMLESS ERROR—INSTRUCTIONS. In a prosecution for prescribing intoxicating liquor after being twice convicted of violating the prohibition law, an erroneous general statement of the law as to his right to issue any prescriptions is not prejudicial, where other instructions plainly restricted the consideration of the jury to prescriptions for intoxicating liquor.

INTOXICATING LIQUORS (49) — UNLAWFUL PRESCRIPTIONS — EVIDENCE—ADMISSIBILITY. In a prosecution for prescribing intoxicating liquor after being twice convicted of violating the prohibition law, it is not error to permit proof of more than two convictions.

[1]Reported in 182 Pac. 584.

Appeal from a judgment of the superior court for King county, Frater, J., entered September 28, 1918, upon a trial and conviction of violating the state-wide prohibition law. Affirmed.

Edward H. Chavelle, for appellant.

Fred C. Brown and *T. H. Patterson,* for respondent.

MAIN, J.—The defendant, a regularly licensed physician, was charged by the information with the crime of issuing a prescription for intoxicating liquor after he had been twice convicted of unlawfully issuing such prescriptions. The trial resulted in a verdict of guilty. From the judgment entered on the verdict, the appeal is prosecuted.

Section 8 of Initiative Measure No. 3, Laws of 1915, page 6 (Rem. Code, § 6262-8), among other things, provides that it shall be unlawful for a physician, after he has been convicted a second time of a violation of any of the provisions of the act, to thereafter write any prescription for the furnishing, delivery or sale of intoxicating liquor.

Prior to being charged in this case, the appellant had been convicted three times of issuing prescriptions for intoxicating liquor when he had no good reason to believe that the persons to whom such prescriptions were issued were actually sick and that the liquor was required as a medicine.

The appellant first claims that the legislative power of the state, whether by initiative measure or an act passed by the legislature, could not deprive a regularly licensed physician of the right or privilege of prescribing intoxicating liquor as a medicine, if he believed the patient's condition required it. It is admitted that, for such offenses as that with which the appellant is here charged, it would have been proper to have deprived him of the right to practice medicine entirely.

No constitutional provision is called to our attention which it is claimed the law here assailed violates. No authority has been presented which holds that the court may declare a legislative act invalid when it does not offend against some constitutional provision. The limitations upon the legislative power must be found, if at all, in constitutional enactments, and not in the judgment or discretion of the courts. The law complained of was a valid exercise of legislative power.

The appellant also objects to an instruction given by the trial court in submitting the cause to the jury, wherein it was said that, if the accused had been twice convicted under the statutes relating to intoxicating liquor, it would be unlawful for him to issue prescriptions. The objection to this instruction is that it did not limit his right to issue a prescription for intoxicating liquor, but was broad enough to include any prescription.

While the instruction is not a correct statement of the law, it nevertheless was not prejudicial. In other instructions the jury were specifically and directly told that, before the accused could be convicted in this action, it was necessary that the evidence should show that he had issued a prescription for intoxicating liquor, after having been twice convicted of violation of the law relating to the issuance of prescriptions for intoxicating liquor.

The instructions as a whole stated the law correctly, and the error complained of does not constitute reversible error. It is plain that the jury could not have been misled by the erroneous general statement of the law which is criticized. *State v. Carter,* 15 Wash. 121, 45 Pac. 745; *State v. Shea,* 78 Wash. 342, 139 Pac. 203.

Upon the trial, evidence was admitted showing that, prior to this charge, the defendant had been three times convicted of violating the prohibition law. It is

claimed that, since the statute makes it unlawful for a physician to issue a prescription for intoxicating liquor, after having been twice convicted of unlawfully issuing such prescriptions, it was error to permit proof of more than that number. There is no merit in this contention. The state was not required to cease the introduction of proof when it had offered sufficient evidence to carry the case to the jury and sustain a conviction.

The judgment is affirmed.

MITCHELL and TOLMAN, JJ., concur.

HOLCOMB, C. J., took no part.

[No. 15294. Department One. July 29, 1919.]

J. Y. C. KELLOGG, *Appellant*, v. B. J. WITTE, *Respondent*, OTIS W. BRINKER, *Garnishee Defendant*.[1]

BAIL (10)—DEPOSIT IN LIEU OF BAIL. In the absence of statute, there is no authority to accept cash in lieu of bail.

SAME (10). Rem. Code, § 2089, authorizing the defendant, in lieu of bail, to deposit cash with the clerk of the court to which he is held, applies only to proceedings in the superior court.

SAME (10). Laws 1919, p. 153, authorizing justices and committing magistrates to accept cash in lieu of bail has no retroactive effect.

GARNISHMENT (19)—PROPERTY SUBJECT—IN CUSTODY OF LAW. Cash accepted by a justice of the peace in lieu of bail, without any legal authority so to do, is not in *custodia legis*, and is subject to garnishment.

Appeal from an order of the superior court for King county, Frater, J., entered December 18, 1918, in favor of the defendant, quashing writs of garnishment, after a hearing before the court. Reversed.

[1]Reported in 182 Pac. 570.

Kellogg, Hyde & Luccock and *J. Grattan O'Bryan*, for appellant.

TOLMAN, J.—On October 7, 1918, appellant, as plaintiff below, filed a complaint against the defendant, respondent here, in the superior court for King county, and on the same day caused a writ of garnishment to issue in said cause, directed to Otis W. Brinker, Justice of the Peace for Seattle Precinct, directing him to appear and answer as to what money or property he had in his possession or under his control belonging to, and what indebtedness, if any, he owed to, respondent. The garnishee defendant answered on October 10 that he had in his possession the sum of $1,500, deposited with him as such justice of the peace by the respondent, as bail for one F. B. Witte and one Francis Bernard Witte, in two certain criminal actions then pending before him, in which the state was plaintiff and the said Wittes were, respectively, defendants. On October 17, respondent appeared specially and moved to quash the writ of garnishment on the grounds that the fund in question was not subject to garnishment, and that the garnishee defendant was not subject to garnishment. Thereafter appellant sued out and caused another writ to be served upon the garnishee defendant, whose answer to the second writ was the same as the answer to the first, and in addition, set forth that the criminal proceedings in which the money had been deposited as bail were dismissed subsequent to the service of the last writ upon him, but prior to the making of the answer thereto. Respondent, maintaining his special appearance, moved to quash the second writ upon the same grounds as set forth in his motion to quash the first, and both motions were heard at the same time, resulting in an order granting both motions

and quashing both writs; from which order this appeal is taken.

The action of the trial court seems to be based upon the theory that money deposited as cash bail in the hands of a justice of the peace is in *custodia legis,* and for that reason is not subject to garnishment. But it is contended here that a justice of the peace has no authority to accept money in lieu of bail, and if he does accept it, having no authority to do so officially, he holds the funds as an individual and for the owner, who may recover by suit if a voluntary return be denied. It seems to be generally held that,

"In the absence of statute conferring such right a magistrate or officer has no authority to accept a deposit of money in lieu of bail." 6 C. J. 1023.

To the same effect are 5 Cyc. 114 and *Brasfield v. Mayor and Alderman of Milan,* 44 L. R. A. (N. S.) 1150, to which case is appended a note exhaustively reviewing the authorities, the great weight of which supports the text above quoted. Our statute with reference to bail before a magistrate is as follows:

"The magistrate before whom such accused person shall be brought, when the offense is bailable, may, at the request of such person, with or without examination, allow him to enter into recognizance, with sufficient sureties, to be approved by the magistrate, conditioned for his appearance in the superior court having jurisdiction of the offense." Rem. Code, § 1951.

Nor had we, prior to the act of 1919, hereinafter referred to, any statute relating to bail before a justice of the peace or magistrate providing any other or different method of giving it. The only statute which we then had on the subject of cash bail in criminal actions was Rem. Code, § 2089, which reads as follows:

"The defendant may, in the place of giving bail, deposit with the clerk of the court to which he is held to

answer the sum of money mentioned in the order; and upon delivering to the sheriff the certificate of deposit, he must be discharged from custody."

A reading of this section, and especially in connection with its context in the act of 1854 (Laws 1854, p. 114, § 80), of which it formed a part, at once suggests that it applies only to proceedings in the superior court; and this court has so held in *McAlmond v. Bevington*, 23 Wash. 315, 63 Pac. 251, 53 L. R. A. 597. Chapter 76 of the Laws of 1919, p. 153, which was enacted after the termination of the proceedings below, and has recently gone into effect, provides that justices of the peace and committing magistrates may accept money as bail; but it has no retroactive effect, and we must therefore hold that, at the time the writs were served, the garnishee defendant held the money described in his answers in his individual rather than in his official capacity.

The order appealed from is reversed, with directions to proceed in harmony with the views herein expressed.

HOLCOMB, C. J., MITCHELL, MAIN, and MACKINTOSH, JJ., concur.

[No. 15340. Department One. July 29, 1919.]

THE STATE OF WASHINGTON, *Respondent*, v. EARL RANDALL, *Appellant*.[1]

INDICTMENT AND INFORMATION (60)—REQUISITES—SUFFICIENCY OF AVERMENTS IN LANGUAGE OF STATUTE. An information under Rem. Code, § 5562-23, is sufficient, where it specifies the day and place of the offense and embodies substantially the language of the statute making it a criminal offense to operate a motor vehicle in other than a careful manner or at a greater speed than is reasonable, etc.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered January 29, 1918, upon a trial and conviction of unlawfully driving an automobile. Affirmed.

Hayden, Langhorne & Metzger, for appellant.

Fred G. Remann, J. W. Selden, and *Elmer E. Healey*, for respondent.

MAIN, J.—The defendant was charged by complaint, before a justice of the peace, with unlawfully driving an automobile. From a judgment of conviction in that court, he appealed to the superior court, where the complaint was demurred to on the ground that it failed to state facts "sufficient to charge this defendant with the commission of any criminal offense." The demurrer was overruled, and the trial resulted in a judgment of conviction and a fine in the sum of $25 and costs. From this judgment, the appeal is prosecuted.

No statement of facts or bill of exceptions has been brought to this court. The only question presented is whether the complaint charges a crime. After specifying the day when, and the place where, the unlawful driving occurred, the complaint substantially follows the language of § 23, ch. 142, Laws of 1915, p. 385 (Rem. Code, § 5562-23 *et seq.*) which provides:

[1]Reported in 182 Pac. 575.

"No person driving or operating any motor vehicle shall drive or operate the same in any other than a careful and prudent manner, nor at any greater speed than is reasonable or proper, having due regard to the traffic and use of the way by others, or so as to endanger the life and limb of any person."

It will be noticed that, under this statute, it is made a criminal offense; first, to drive or operate a motor vehicle in other than a careful and prudent manner; second, at a greater rate of speed than is reasonable or proper, having due regard to the traffic and use of the way by others; and third, so as to endanger the life or limb of any person. Whether this statute falls within the class which defines separate and distinct offenses, under the rule stated in *Seattle v. Molin,* 99 Wash. 210, 169 Pac. 318, or whether it falls within the class of statutes which define but one crime but specify the various ways in which that crime may be committed, it is not necessary here to determine.

The demurrer to the complaint was based upon the sole ground that the complaint did not state facts sufficient to charge a crime. The only question then to determine is whether a complaint or information which specifies the day and the place of the offense and embodies substantially the language of the statute charges a crime. Attention here will only be given to that portion of the statute which provides that no person shall drive a motor vehicle at any greater speed than is reasonable and proper, having due regard to the traffic and use of the way by others. If, under this provision, a crime is charged, it is unnecessary to inquire further. It is undoubtedly the rule in this jurisdiction that it is sufficient, in charging a crime, to follow the language of the statute, where such crime is there defined and the language used is sufficient to apprise the accused, with reasonable certainty, of the

nature of the accusation, so that he may be able to avail himself of his acquittal or conviction as a protection against further prosecutions for the same offense. *State v. Ryan,* 34 Wash. 597, 76 Pac. 90; *State v. Martin,* 94 Wash. 313, 162 Pac. 356; *State v. Richter,* 95 Wash. 544, 164 Pac. 250.

It is said that the charge in the present case does not contain facts, but conclusions only. But to charge the accused with driving an automobile at a greater rate of speed than is reasonable and proper, having due regard to the traffic and use of the way by others, falls within the rule of those cases which hold that a complaint or information in the language of the statute is sufficient. *State v. Columbus,* 74 Wash. 290, 133 Pac. 455; *State v. Crane,* 88 Wash. 210, 152 Pac. 989. While the defendant in the cases cited was not charged with the crime of unlawfully driving an automobile, yet we think that they are controlling. The information in each case substantially followed the language of the statute, and the present charge is no more subject to the criticism directed against it than were the informations in those cases.

The case of *State v. Carey,* 4 Wash. 424, 30 Pac. 729, is referred to in the *Crane* case and there distinguished.

The judgment will be affirmed.

MACKINTOSH, TOLMAN, and MITCHELL, JJ., concur.

HOLCOMB, C. J., took no part.

[No. 14209. *En Banc.* June 12, 1919.]

THE STATE OF WASHINGTON, *Appellant*, v. POSTAL TELEGRAPH-CABLE COMPANY, *Respondent*.[1]

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered November 25, 1916, in favor of the defendant, dismissing on the pleadings an action to recover premiums due under the provisions of the industrial insurance act. Reversed in part, and affirmed in part.

W. V. Tanner (*John H. Dunbar*, of counsel), for appellant.
O. L. Willett (*W. W. Cook*, of counsel), for respondent.

ON REHEARING.

PER CURIAM.—Since the original opinion was filed in this case (101 Wash. 630, 172 Pac. 902, 176 Pac. 346), the state has waived its right to file a reply to the answer of respondent, as permitted therein. That part of the judgment must therefore be affirmed.

[No. 15303. Department One. June 18, 1919.]

In the Matter of the Estate of CHARLES BENJAMIN SMITH. JAMES ARMSTRONG *et al.*, *Appellants*, v. C. R. JACKSON, *State Tax Commissioner, Respondent*.[2]

Appeal from a judgment of the superior court for King county, Frater, J., entered December 3, 1918, in favor of the state tax commissioner, in an action to determine the method of computing an inheritance tax, tried to the court. Reversed.

Kerr & McCord and *Stephen V. Carey*, for appellants.
C. R. Jackson, State Tax Commissioner, and *Geo. G. Hannan, Assistant*, for respondent.

PER CURIAM.—The questions involved here are identical with those decided in the case of *In re Corbin's Estate*, *ante* p. 424, 181 Pac. 910. The trial court in this case, however, held against the contention of the executors, and entered a judgment upholding the computation of the inheritance tax as made by the state tax commissioner. For the reasons stated in the *Corbin* case, the judgment here appealed from is reversed, and the cause remanded with directions to compute the tax upon the amount going to each devisee or legatee, as a separate entity.

[1]Reported in 183 Pac. 429.

[2]Reported in 183 Pac. 517.

[No. 15133. Department Two. July 8, 1919.]

DOROTHY PIERCE *et al.*, *Respondents*, v. SECURITY INSURANCE COMPANY, *Appellant*.[1]

Appeal from a judgment of the superior court for King county, Smith, J., entered April 22, 1918, upon the verdict of a jury rendered in favor of the plaintiffs, in an action on a fire insurance policy. Affirmed.

H. T. Granger, for appellant.
George Olson, *Jay C. Allen*, and *W. R. Bell*, for respondents.

PER CURIAM.—This is an action upon an insurance policy issued by the defendant insurance company to J. C. Lewis, and providing that loss, if any, shall be payable to Mrs. Pierce and Lewis as their respective interests may appear. The insurance here in question is upon the same property and is concurrent with that involved in the case of *Pierce v. Globe & Rutgers Fire Ins. Co.*, *ante* p. 501, 182 Pac. 586. The only question here to be considered is as to whether or not it can be decided, as a matter of law, that the insured shall be precluded from recovering under the policy because of the failure of Lewis, without reasonable excuse, to submit to an examination under oath by a representative of the insurance company. The facts disclosed by this record touching that question are, in substance, the same as in the *Globe & Rutgers Fire Ins. Co.* case. The trial in this case was before a jury, which found against the insurance company, as in that case. A discussion of this question would be but to repeat in substance what we said in that case.

The judgment is affirmed.

[1]Reported in 182 Pac. 588.

[No. 15132. Department Two. July 8, 1919.]

DOROTHY PIERCE *et al.*, *Respondents*, v. GENERAL FIRE ASSURANCE COMPANY, *Appellant*.[1]

Appeal from a judgment of the superior court for King county, Dykeman, J., entered April 22, 1918, upon the verdict of a jury rendered in favor of the plaintiffs, in an action on a fire insurance policy. Affirmed.

H. T. Granger, for appellant.
George Olson, *Jay C. Allen*, and *W. R. Bell*, for respondents.

PER CURIAM.—This is an action upon an insurance policy issued by the defendant assurance company to J. C. Lewis, and providing that loss, if any, shall be payable to Mrs. Pierce and Lewis as their respective interests may appear. The insurance here in question was upon the equipment of a store conducted by Lewis, which he held under a contract of sale from Mrs. Pierce. The loss was caused by the same fire which destroyed the buildings covered by insurance involved in the cases of *Pierce v. Globe & Rutgers Fire Ins. Co.*, *ante* p. 501, 182 Pac. 586, and *Pierce v. Security Ins. Co.*, *ante* p. 699, 182 Pac. 588. The question as to whether or not it can be decided, as a matter of law, that the insured shall be precluded from recovery upon the policy because of the failure of Lewis, without reasonable excuse, to submit to an examination under oath by a representative of the assurance company, is the main question presented for consideration upon this appeal. The facts disclosed by this record touching that question are, in substance, the same as in the *Globe & Rutgers Fire Ins. Co.* case. The trial in this case was before a jury, which found against the assurance company, as in that case. A discussion of this question would be but to repeat in substance what we said in that case.

Some other claims of error are made and very briefly argued by counsel for the assurance company. These we have examined, and deem it sufficient to say that they do not call for reversal.

The judgment is affirmed.

[1]Reported in 182 Pac. 588.

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2. SAME (8)—CONSENT OF PARTIES. After delivery of a deed, an alteration, inserting the name of an additional grantee, has no effect upon the grantee's title, even though it be with consent of the parties, in the absence of evidence that the deed was redelivered. *Engstrom v. Peterson* 523

Amendment:

Ratification of amendment to Federal constitution, see STATUTES, 1-4.
Of statutes, title of amendment, see STATUTES, 6.

Answer:

Appealability of order striking answer, see APPEAL AND ERROR, 1.
Traverse of answer in garnishment, see GARNISHMENT, 2.
In pleading, see PLEADING, 2.

Appeal and Error:

Costs on appeal, see COSTS, 2, 3.
Criminal prosecutions, see CRIMINAL LAW, 6.
Questions considered by supreme court on application for writ, see PROHIBITION.

Appeal and Error—Continued.

III. DECISIONS REVIEWABLE.

1. APPEAL (48)—DECISIONS REVIEWABLE—FINAL ORDERS. An order striking an answer of one of the defendants is not appealable because it is not a final order within the contemplation of Rem. Code, § 1716. *Nishimoto v. Vernon*..... 555

2. APPEAL AND ERROR (50)—FINAL ORDERS—GRANTING NEW TRIAL. An order granting a new trial is not appealable as a final order. *Picco v. Roney*..... 202

3. SAME (67)—DECISIONS REVIEWABLE—RECEIVERS. An order refusing to appoint a receiver is an order from which an appeal may be taken under the statute. *Liebig v. Liebig*..... 464

4. APPEAL (71) — DECISIONS REVIEWABLE — REDUCING ALIMONY. An order reducing alimony is an order affecting a substantial right and therefore appealable. *Liebig v. Liebig*..... 464

V. PRESERVATION OF GROUNDS.

5. APPEAL (111)—PRESERVATION OF GROUNDS—OBJECTIONS NOT PRESENTED BELOW. In an action against a county, objections to the sufficiency of the notice of claim not presented below cannot be considered on appeal. *Brengman v. King County*..... 306

6. APPEAL (140)—EXCEPTIONS—EXCLUSION OF EVIDENCE. Under Rem. Code, § 385, no formal exception is necessary to the ruling of the court rejecting evidence. *Coldeen v. Reid*..... 508

7. SAME (142)—EXCEPTIONS—TO INSTRUCTIONS. No exception to the refusal to give an instruction is necessary to preserve an objection to the exclusion of evidence after objections and ruling made at the trial. *Coldeen v. Reid*..... 508

8. SAME (142). After error in refusing to give a requested instruction, exceptions to the instructions given are not necessary to preserve the question. *Coldeen v. Reid*..... 508

9. APPEAL (148)—EXCEPTIONS TO CONCLUSIONS. It is not necessary to take exceptions to conclusions of law. *Nishimoto v. Vernon*.. 555

VII. REQUISITES FOR TRANSFER OF CAUSE.

10. APPEAL (173)—TIME FOR TAKING—COMMENCEMENT OF PERIOD. The time for taking an appeal commences to run from the time the judgment is filed and marked filed and entered on the appearance docket, and not from the date of its actual recording. *Mathison v. Anderson*..... 617

11. SAME (179) — TIME FOR TAKING — COMMENCEMENT OF PERIOD — GRANTING NEW TRIAL. Where an order granting a new trial recites the entry and allowance of exceptions at the time of signing the order and making the decision, the time for taking an appeal begins to run from entry of the order. *Picco v. Roney*..... 202

Appeal and Error—Continued.

12. SAME (181)—TIME FOR TAKING—NEW TRIAL. Appeal from an order granting a new trial must be taken within fifteen days after entry or notice, under Rem. Code, § 1718, limiting the time for appeals from any order other than a final one. *Picco v. Roney*.. 202

IX. SUPERSEDEAS OR STAY OF PROCEEDINGS.

13. APPEAL (244)—SUPERSEDEAS—BY SUPREME COURT. Under Const., art. 4, § 4, authorizing the supreme court to issue writs in aid of its appellate jurisdiction, the supreme court will grant a supersedeas to judgment debtors, on their appeal from an order refusing to vacate a judgment obtained by fraud, upon giving bond in double the amount of the balance due, where it appears that proceedings were pending to enforce the judgment and if property was sold pending the appeal it would probably not be possible to put the parties in *statu quo*. *Hillman v. Gordon*..... 249

X. RECORD.

14. APPEAL (263)—RECORD—STATEMENT OF FACTS. In the absence of statement of facts or bill of exceptions, the supreme court cannot pass upon any question as to the instructions. *State v. Callaghan*... 486

15. APPEAL (275, 317)—RECORD—STATEMENT OF FACTS—CERTIFICATE AS TO MATERIAL FACTS—EFFECT OF STIPULATIONS. The evidence must be brought up by bill of exceptions or statement of facts, certified by the judge to contain all the material facts, and a stipulation of counsel that it contains all the material facts cannot supplement or be substituted for an insufficient certificate. *Lamb-Davis Lumber Co. v. Stowell*..... 212

16. APPEAL (284, 398)—PRESUMPTIONS — JUDGMENTS IN ABSENCE OF STATEMENT. In the absence of a bill of exceptions or statement of facts, it will be presumed, in aid of a judgment of replevin, that precedent demand was made or that the defense interposed made demand unnecessary. *Burke v. Wilson*..... 454

17. APPEAL (288) — STATEMENT OF FACTS — EXTENSION OF TIME FOR FILING — EXCUSE FOR DELAY. Failure to file a statement of facts within thirty days is excused, and an application for an extension of time, made within the sixty days when an appeal could have been taken, should have been granted, and a proposed statement filed within the ninety days permitted by an extension should have been received and certified, where appellant's attorney was quarantined at his home during an epidemic and thereby prevented from acting earlier. *Howell v. Dunning*..... 369

18. SAME (288, 311)—STATEMENT OF FACTS—EXTENSION OF TIME—COMPELLING ALLOWANCE. Under Rem. Code, § 1730-8, appellant, erroneously refused an extension of time for filing a proposed statement of facts, may proceed by motion in the supreme court to obtain an extension of time and direction to the lower court to certify a

Appeal and Error—Continued.

statement; or such motion will be considered as an application for a writ of review. *Howell v. Dunning* 369

19. SAME (326)—RECORD—FAILURE TO FILE IN TIME. Under Rem. Code, § 1729, relative to filing a transcript of record, an appeal must be dismissed where no excuse is given for delay in filing the transcript within ninety days and it was not supplied until after motion to dismiss the appeal. *Picco v. Roney* 202

XI. BRIEFS.

20. APPEAL (341)—BRIEFS—DESIGNATION OF APPELLANT. Appellant's brief will not be stricken or judgment affirmed on account of a misnomer of appellant corporation, where it appears to be identical with the name contained in and signed to the contract in suit. *Berry v. National Council of Knights & Ladies of Security* 531

XVI. REVIEW.

Review of assessment of benefits to property in drainage district, see DRAINS, 2.

From award of damages by industrial insurance commission, see MASTER AND SERVANT, 5, 6.

21. SAME (379, 380)—REVIEW—INTERLOCUTORY ORDERS—APPEAL FROM FINAL JUDGMENT OR SPECIFIC ORDER. Rem. Code, § 1716, providing that an appeal from a final judgment shall bring up for review any order made in the same action or proceeding, refers to interlocutory orders occurring in the trial of the case; and an appeal from an order quashing a writ of garnishment to enforce a judgment of alimony does not bring up for review prior orders made reducing the alimony or refusing to appoint a receiver in prior proceedings relating to the alimony and its enforcement. *Liebig v. Liebig* ... 464

22. APPEAL (386, 387)—REVIEW—WAIVER OF ERROR. The waiver of a motion for new trial does not carry with it and condone whatever errors might have been considered under it, where they were raised and insisted upon under appellant's motion for judgment notwithstanding the verdict. *Lauridsen v. Bowden, Gazzam & Arnold* .. 310

23. APPEAL (413)—REVIEW—VERDICTS. The verdict of a jury in a personal injury case will not be set aside as excessive if supported by plaintiff's evidence. *Allen v. Schultz* 393

24. APPEAL (414)—REVIEW—VERDICT. The verdict of a jury upon a direct conflict of fact will not be disturbed on appeal. *Swafford v. Levine* 363

25. APPEAL (418) — REVIEW — FINDINGS. Findings upon conflicting testimony given mostly in person will not be disturbed on appeal where the evidence does not clearly preponderate against them. *Oregon-Washington Lumber & Manufacturing Co. v. Bay City Lumber Co.* 353

Appeal and Error—Continued.

26. APPEAL (473)—REVIEW—LAW OF CASE. The facts on a second trial being the same as on the former trial, the decision on the former appeal becomes the law of the case. *Ecuyer v. New York Life Insurance Co*..... 411

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

27. APPEAL (498)—RECALL OF REMITTITUR—JURISDICTION. Where the supreme court did not acquire jurisdiction because the appeal was not taken within ninety days, the remittitur may be recalled to hear a motion to dismiss, filed but not properly presented to the court at the time set for hearing. *Mathison v. Anderson*..... 617

Application:

Of payments, see CHATTEL MORTGAGES, 6, 7.

Appointment:

Of receiver for solvent corporation, see CORPORATIONS, 4, 5.
Of public officers in general, see OFFICERS, 1.
Of receiver, see RECEIVERS.

Apportionment:

Of assessments on property in drainage district, see DRAINS.

Appraisement:

Sale of property at less than appraised value, see EXECUTORS AND ADMINISTRATORS, 3, 4.
Liability of administrator for appraised value of property on final accounting, see EXECUTORS AND ADMINISTRATORS, 5, 11.

Arrest:

Wrongful death in attempting to make arrest, see SHERIFFS AND CONSTABLES.

1. ARREST (6)—AUTHORITY—FORCE—MISDEMEANOR. In attempting to make an arrest for a misdemeanor, police officers have no warrant to maim or kill a person who attempts to escape. *Coldeen v. Reid* 508

Assessment:

Of expenses of public improvements, see DRAINS.
Of compensation for property taken for public use, see EMINENT DOMAIN, 4.
Of benefits from commercial waterway, see NAVIGABLE WATERS.
Of commercial waterway districts, sufficiency of title of act, see STATUTES, 6.

Assets:

Of insolvent bank, see BANKS AND BANKING.

Assignments:

Of action, see ABATEMENT AND REVIVAL, 4.

1. ASSIGNMENTS (6, 29)—"CHOSE IN ACTION"—RIGHT OF ASSIGNEE TO SUE. An assignment of any right of action growing out of a conversion of personal property which the assignor had held as security for a debt, is the assignment of "a chose in action for the payment of money," within Rem. Code, § 191, authorizing an assignee for the purposes of suit to maintain an action thereon in his own name; and authorizes an action for the recovery of the property or in the alternative for its value. *Burke v. Wilson*..... 454

Associations:

Mutual benefit insurance associations, see INSURANCE, 12, 13.

Assumption:

Of risk by employee, see MASTER AND SERVANT, 2, 3.

Attorney and Client:

Quarantine of attorney during epidemic, as excuse for delay in filing statement of facts, see APPEAL AND ERROR, 17.
Attorney's fees in action on note, see BILLS AND NOTES.
Allowance of attorney's fees, see EXECUTORS AND ADMINISTRATORS, 12.
Advice of counsel instituting prosecution as constituting probable cause, see MALICIOUS PROSECUTION.
Attorney's fees on foreclosure of mortgage, see MORTGAGES.
Powers of board to employ special counsel, see SCHOOLS AND SCHOOL DISTRICTS, 1.
Argument or conduct of counsel at trial in civil actions, see TRIAL, 2.

1. ATTORNEY AND CLIENT (7)—DISBARMENT—GROUNDS. An attorney should be disbarred where it appears that he induced a client to give him a mortgage which he was to hold for the client's benefit, but which he sold to a *bona fide* purchaser, appropriating the proceeds, that he received money for services which he falsely represented he performed, and that in several other transactions he obtained possession of money belonging to his clients or associates and wrongfully appropriated and refused to account for the same. *In re Martin*..... 372

2. ATTORNEY AND CLIENT (7, 7-1) — DISBARMENT — GROUNDS. An attorney is guilty of misconduct for which he should be disbarred, where he settled and dismissed an action, receiving $5,000 which he misappropriated and retained for years without disclosing the settlement. *In re Martin*..... 461

Authority:

Of police officers in attempt to make arrest, see ARREST.
To accept cash in lieu of bail, see BAIL.
Of agent, see INSURANCE, 1-3.

Automobiles:

Liability of owner for injuries by employee, see MASTER AND SERVANT, 7, 8.

Collision with in city street, see MUNICIPAL CORPORATIONS, 4-9.

Contributory negligence of servant imputed to master, see NEGLIGENCE, 3.

Award:

Of damages by industrial insurance commission, see MASTER AND SERVANT, 5, 6.

Bail:

Cash accepted in lieu of bail as subject to garnishment, see GARNISHMENT, 1.

1. BAIL (10)—DEPOSIT IN LIEU OF BAIL. In the absence of statute, there is no authority to accept cash in lieu of bail. *Kellogg v. Witte* 691

2. SAME (10). Rem. Code, § 2089, authorizing the defendant, in lieu of bail, to deposit cash with the clerk of the court to which he is held, applies only to proceedings in the superior court. *Kellogg v. Witte* 691

3. SAME (10). Laws 1919, p. 153, authorizing justices and committing magistrates to accept cash in lieu of bail has no retroactive effect. *Kellogg v. Witte* 691

Bailment:

1. BAILMENT (3) — NEGLIGENCE (22-1—24) — IMPUTED NEGLIGENCE — SERVANT OR BAILEE. Where a farm hand was, on Sunday, driving his employer's automobile for his own pleasure, when it was struck at a railroad crossing, his relation was that of a bailee, and his own contributory negligence is not imputable to the owner and is no defense to an action against the company, although he was employed at "so much a month and had the use of the car." *Lloyd v. Northern Pac. R. Co.* 57

Bankruptcy:

Action by trustee to enforce liability for stock purchased, see CORPORATIONS, 2.

1. BANKRUPTCY (6, 7)—FRAUDULENT TRANSFERS—RIGHTS OF TRUSTEE. Where payments made were sufficient to discharge the bankrupt's chattel mortgage, a foreclosure sale thereunder is unlawful and void as to the trustee in bankruptcy and creditors of the mortgagor. *Simpson v. Combes* 575

2. SAME (7, 18)—ACTIONS BY TRUSTEE—JUDGMENT—SURPLUS. Chattel mortgagees having unlawfully foreclosed the mortgage and disposed of the property of the bankrupt mortgagor, cannot object to judg-

Bankruptcy—Continued.

ment in favor of the trustee in bankruptcy for the value of the property, on the ground that it exceeds the amount necessary to pay all claims, where the judgment provides that any surplus left after discharge of all obligations should be paid over to them. *Simpson v. Combes* 575

3. BANKRUPTCY (7) — FRAUDULENT TRANSFERS — EVIDENCE — SUFFICIENCY. The evidence does not sustain findings of conspiracy and fraud by chattel mortgagees to the detriment of the bankrupt mortgagor's creditors, where it merely appears that they did not enforce payment according to the terms of the mortgage, and extended the time of maturity. *Simpson v. Combes*..... 575

4. BANKRUPTCY (7, 12)—DISCHARGE—EFFECT—FRAUDULENT TRANSFER. Where an insolvent debtor, with property subject to two mortgages, made fictitious deeds to relatives, procured a collusive foreclosure of the first mortgage under an agreement to pay the debt in installments and redeem at any time, and then went through bankruptcy, obtaining a discharge of personal liabilities to evade the second mortgage indebtedness, subsequently redeeming the title, he will be held in equity to have retained the property for the protection of the second mortgagee and not for the purpose of defeating his rights; since there never was a bona fide sale or foreclosure. *Sabin v. Smith* 656

5. BANKRUPTCY (18)—ACTIONS BY TRUSTEE—RIGHT TO SUE. A trustee in bankruptcy may maintain an action to set aside a foreclosure and sale of the bankrupt's property, made prior to the filing of petition in bankruptcy, where the same was in fraud of the bankrupt's creditors, although the bankrupt did not oppose the sale. *Simpson v. Combes* 575

6. BANKRUPTCY (18) — DEBTS DUE BANKRUPT — DEFENSES — SUFFICIENCY OF ASSETS. In an action by a trustee in bankruptcy to recover the amount due to a bankrupt corporation on a sale of its treasury stock, the complaint need not show that the bankrupt did not have sufficient other property to pay its debts. *Benner v. Billings* 1

Banks and Banking:

Priority of claims of state against insolvent bank, see STATES, 1.

1. BANKS AND BANKING (7)—INSOLVENCY—POWERS OF EXAMINERS—PREFERENCE CLAIMS. Under Rem. Code, §§ 3303-1 to 3303-19, abolishing receiverships of insolvent banks and placing the administration in the hands of the state bank examiner, with power to determine the necessity and amount of assessments and to liquidate its affairs, the state cannot claim a preference on assets in the hands of the examiner, especially in view of § 3303-12, providing that, upon com-

Banks and Banking—Continued.

plete liquidation, proceeds shall be delivered to the stockholders, and the debtor bank is not revested therewith. *Aetna Casualty & Surety Co. v. Moore* 99

Bar:

Of action by former adjudication, see DIVORCE, 3; JUDGMENT, 2, 3.

Beneficial Associations:

Mutual benefit insurance associations, see INSURANCE, 12, 13.

Benefits:

To property from drainage ditch, see DRAINS.

As affecting compensation for appropriation of property, see EMINENT DOMAIN, 4.

Bills and Notes:

Equitable interest in note as subject to execution, see EXECUTION.

Usurious mortgage note, see USURY.

1. BILLS AND NOTES (144)—ACTIONS—ATTORNEY'S FEES. In an action on a promissory note for $8,572 and a reasonable attorney's fee, in which the court found a balance due of $587, the sum of $300 is a sufficient allowance for attorney's fees. *Kienbaum v. Rathfon Reduction Works* 115

Boards:

Powers of school district board to employ special counsel, see SCHOOLS AND SCHOOL DISTRICTS, 1.

Bonds:

Garnishment proceedings, see GARNISHMENT, 3.

On release of property pending foreclosure of lien, see MARITIME LIENS.

Of waterway district, see NAVIGABLE WATERS.

Sureties on bonds, see PRINCIPAL AND SURETY.

School district bonds, see SCHOOLS AND SCHOOL DISTRICTS, 2.

Action on sheriff's bond for wrongful death in attempting to make arrest, see SHERIFFS AND CONSTABLES.

Contractor's bonds, see STATES, 2-4.

Of commercial waterway districts, sufficiency of title of act, see STATUTES, 6.

Breach:

Of coal mine lease, see MINES AND MINERALS, 4.

Of contract to furnish water for irrigation, see WATERS AND WATER COURSES, 6.

Briefs:

On appeal or writ of error, see APPEAL AND ERROR, 20.

Brokers:

Contracts for commissions as affected by statute of frauds, see FRAUDS, STATUTE OF, 3, 4.

Agency in general, see PRINCIPAL AND AGENT.

Building and Loan Associations:

Necessity of alleging intent, in prosecution for violation of act by officer or agent, see INDICTMENT AND INFORMATION, 1.

Buildings:

Cost of, as basis for rent, see LANDLORD AND TENANT, 1, 2.

Burden of Proof:

To show oral agreement as to application of payments by mortgagee, see CHATTEL MORTGAGES, 6.

Evidence to sustain good faith of offer of husband to resume marital relation, see DIVORCE, 2.

In civil actions, see EVIDENCE, 4.

To show agency relation, see INSURANCE, 2.

To show breach of condition in policy of insurance, see INSURANCE, 7.

To show acts of servant in course of employment, see MASTER AND SERVANT, 8.

Cancellation of Instruments:

1. CANCELLATION OF INSTRUMENTS (23½)—EVIDENCE—WEIGHT AND SUFFICIENCY. In an action for the cancellation of a deed, given in consideration of an agreement to convey other land of the same value, findings for the plaintiff are sustained, where the evidence of the parties as to the agreement was flatly contradictory, but defendant could show no convincing reason for the deed and the circumstances did not indicate a gift. *Salt v. Anderson*..... 149

2. CANCELLATION OF INSTRUMENTS (26)—RELIEF—RECOVERY OF DAMAGES. In an action for the cancellation of a deed upon the ground of failure of consideration, in which the prayer was for general relief, a court of equity may substitute a money judgment. *Salt v. Anderson* 149

Carriers:

Injuries to trespassers or licensees on train, see RAILROADS.

1. CARRIERS (31, 32)—OF GOODS—LOSS—PLEADING AND EVIDENCE. In an action against an express company to recover for a lost trunk and contents, defendant's answer admitting that it received a trunk for plaintiffs, does not preclude the granting of a nonsuit, where no evidence was introduced as to its value. *Johnson v. Western Express Co.* 339

2. CARRIERS (32) — OF GOODS — LOSS—EVIDENCE—ADMISSIBILITY. In an action against an express company for a lost trunk and contents,

Carriers—Continued.

left at a hotel and four months later directed to be delivered to the initial carrier by the hotel, the plaintiffs' evidence of the contents of the trunk at the time it was delivered to the hotel is inadmissible without proof that the trunk and contents delivered to the initial carrier was the same trunk and contents received by the hotel from the plaintiffs. *Johnson v. Western Express Co*..... 339

Causes of Action:

See ACTION.

Certainty:

Of contract of sale, see SALES, 1, 2.

Certificate:

To statement of facts or bill of exceptions, see APPEAL AND ERROR, 15.
Notarial certificate to chattel mortgage, see CHATTEL MORTGAGES, 1
Filing certificate of assumed name as condition precedent to action, see PARTNERSHIP, 2.
Of delinquency, purchase by county treasurer, see TAXATION, 2.

Change of Parties:

As discharging surety, see PRINCIPAL AND SURETY.

Charge:

To jury in criminal prosecutions, see CRIMINAL LAW, 6.
In civil actions, see TRIAL.

Charges:

Against executors and administrators in settlement of estate, see EXECUTORS AND ADMINISTRATORS, 5, 11.
Regulation of charges by gas company, see GAS.

Chattel Mortgages:

Foreclosure and sale of bankrupt's property as fraudulent transfer, see BANKRUPTCY, 1-4, 5.

1. CHATTEL MORTGAGES (16, 18)—AFFIDAVIT—NOTARIAL CERTIFICATE—SUFFICIENCY. A chattel mortgage will not be held void as to creditors by reason of failure of the notary taking the acknowledgment and affidavit of good faith to impress his notarial seal upon the certificate to the affidavit of good faith, where such seal was duly affixed to his certificate to the acknowledgment, made by the same person who swore to the affidavit which immediately followed the acknowledgment, all constituting one instrument executed in all its parts at the same time. *Woods v. Young Lumber Co*..... 432

2. CHATTEL MORTGAGES (46, 51) — POSSESSION OF MORTGAGEE — RECOVERY. The rule that a chattel mortgagee has no right to recover

Chattel Mortgages—Continued.

possession of the mortgaged property has no application to a mortgage which contemplates the actual transfer of possession; and after such transfer of possession to the mortgagee has actually been made, the mortgagee may maintain replevin when the property is wrongfully taken and withheld. *Burke v. Wilson*..... 454

3. CHATTEL MORTGAGES (48-3, 49)—POSSESSION OF PROPERTY AND DISPOSITION OF PROCEEDS. A mortgage of a stock of goods is valid, although it leaves the mortgagor in possession with power to sell in the course of trade under an agreement to apply a portion of receipts to a discharge of the mortgage indebtedness. *Simpson v. Combes* 575

4. CHATTEL MORTGAGES (61) — FORECLOSURE — INSECURITY OF DEBT — REASONABLE JUSTIFICATION. To entitle a chattel mortgagee to a foreclosure under the insecurity clause when he "deems" himself insecure, he must act in a reasonable manner; and it is no justification for premature suit that the mortgagor had sent away from the mill a few small items of no particular value not impairing the security, which had been greatly increased since giving the mortgage; nor that there was a breach of the warranty in the mortgage against incumbrance by the existence of two conditional sales contracts, known to the mortgagee when it made the loan; nor that the mortgagor was indebted on several outstanding obligations, where the mill had just been completed and when operated would show a net daily profit. *Skookum Lumber Co. v. Sacajawea Lumber & Shingle Co*..... 356

5. SAME (61). Upon an issue as to whether plaintiff acted reasonably in "deeming" himself insecure and instituting an action to foreclose a chattel mortgage on mill machinery before maturity of the debt, the fact that the mortgagee failed to furnish logs or shingle bolts to keep the mill running, as contemplated by a contract between the parties, may be considered as bearing upon his good faith in attempting foreclosure, although the contract did not obligate the mortgagee to furnish the logs. *Skookum Lumber Co. v. Sacajawea Lumber & Shingle Co*..... 356

6. CHATTEL MORTGAGES (69, 72)—PAYMENT — DEFENSES — BURDEN OF PROOF. A chattel mortgage on a stock of goods having provided that monthly payments should be applied to the discharge of the mortgage indebtedness, the burden of proof of an oral agreement that the same might be applied on rent due from the mortgagor to the mortgagee is upon the mortgagee. *Simpson v. Combes*..... 575

7. SAME (69, 72) — PAYMENT — APPLICATION — RIGHTS OF PARTIES. A chattel mortgage on a stock of goods having provided that monthly payments should be applied to the discharge of the mortgage indebtedness, and there being no oral agreement that they be applied on rent due from the mortgagor to the mortgagee, the mortgagee had no right to so apply them. *Simpson v. Combes*..... 575

Child:

Proceedings against delinquent child, see INFANTS.

Chose in Action:

Assignment of and right to sue, see ASSIGNMENTS.

Cities:

See MUNICIPAL CORPORATIONS.

Claims:

Review of sufficiency of notice of as dependent on objections in lower court, see APPEAL AND ERROR, 5.
Right of state to claim preference on assets of insolvent bank in hands of bank examiner, see BANKS AND BANKING.
Against estate of decedent, see EXECUTORS AND ADMINISTRATORS, 6-9.
Priority of claims of state against insolvent bank, see STATES, 1.
Inclusion of nonlienable items in claim against contractor's bond, see STATES, 3.

Coal Lands:

Lease of coal mine, forfeiture of, see MINES AND MINERALS, 3, 4.

Codes:

Construction of, see STATUTES, 9.

Collateral Attack:

On judgment of former conviction under prohibition act, see CRIMINAL LAW, 4.

Collision:

Between auto and train at crossing, see BAILMENT.
Between vehicles or with persons using streets, see MUNICIPAL CORPORATIONS, 4-9.
Negligence of driver of vehicle imputed to master, see NEGLIGENCE, 3.

Commands:

Compliance with by servant as affecting assumption of risk, see MASTER AND SERVANT, 3.

Commerce:

Carriage of goods and passengers, see CARRIERS.

Commercial Waterway Districts:

Sufficiency of title of act, see STATUTES, 6.

Commissioners:

Industrial code commissioners as officers, see OFFICERS, 1.
Salary of port commissioners, increase during term, see OFFICERS, 2.

Commissions:

Of executor or administrator, see EXECUTORS AND ADMINISTRATORS, 13-15.

Contract for broker's commissions, see FRAUDS, STATUTE OF, 3, 4.

Community Property:

Disposition on divorce, see DIVORCE, 6.

In general, see HUSBAND AND WIFE.

Compensation:

Attorney's fees in action on note, see BILLS AND NOTES.

For property taken for public use, see EMINENT DOMAIN, 5-8.

Of executor or administrator, see EXECUTORS AND ADMINISTRATORS, 13-15.

For use of money, see INTEREST.

Of attorney on foreclosure of mortgage, see MORTGAGES.

Of municipal officers, see MUNICIPAL CORPORATIONS, 1.

Of officers in general, see OFFICERS, 2.

Competency:

Of witnesses in general, see WITNESSES.

Complaint:

In civil action, see PLEADING, 1.

Computation:

Of inheritance tax, see TAXATION, 3.

Conclusion:

In pleading, see PLEADING, 1.

Conclusions of Law:

Review as dependent on exceptions in lower court, see APPEAL AND ERROR, 9.

Conclusiveness:

Of judgment of former conviction under prohibition act, see CRIMINAL LAW, 4.

Of judgment in suit for divorce, see DIVORCE, 3.

Of judgment, as against indemnitor of former adjudication against indemnitee, see INDEMNITY, 2, 3.

Of judgments, see JUDGMENT, 2, 3.

Condemnation:

Taking property for public use, see EMINENT DOMAIN.

Condition:

Precedent to foreclosure of deed securing advances, see MINES AND MINERALS, 2.

Condition—Continued.

Precedent to action by partnership, see PARTNERSHIP, 2.

Precedent to action for specific performance, see SPECIFIC PERFORMANCE, 2.

Conduct of Counsel:

At civil trial, see TRIAL, 2.

Consent:

Of parties to alteration of deed, see ALTERATION OF INSTRUMENTS, 2.

Consideration:

Failure of, as ground for cancellation, see CANCELLATION OF INSTRUMENTS.

Conspiracy:

Abatement of action for, by death, see ABATEMENT AND REVIVAL, 5.

1. CONSPIRACY (7) — TO DEFRAUD — EVIDENCE — SUFFICIENCY. Under the rule that circumstances to establish a conspiracy to defraud must be inconsistent with a lawful purpose and that it is necessary to show that the person entered into an agreement with the other conspirators to accomplish the objects, a married woman's participation in the conspiracy of her husband and others, to defraud in obtaining subscriptions to valueless corporate stock, is not sufficiently established by evidence that, three or four years after the subscriptions were obtained, she did some business errands at the request of her husband relating to collections and was connected with a few subsequent transactions of like effect, and expressed an opinion that the subscribers would make considerable profit, it appearing that she took no part in the immediate transaction, and had only such knowledge as she derived from her husband. *Dart v. McDonald* 537

Constables:

See SHERIFFS AND CONSTABLES.

Constitutional Law:

Increase of salary of municipal officer during term, see MUNICIPAL CORPORATIONS, 1; OFFICERS, 2.

Ratification of proposed amendment to Federal constitution, see STATUTES, 1-4.

Subjects and titles of statutes, see STATUTES, 6.

1. CONSTITUTIONAL LAW (3)—CONSTRUCTION. The provisions of the constitution are to be construed in the common and natural view, to determine, if possible, the intention of the law makers. *State ex rel. French v. Clausen* 667

Constitutional Law—Continued.

2. CONSTITUTIONAL LAW (3) — CONSTRUCTION. Constitutional provisions must be interpreted with reference to the times and circumstances under which the constitution was framed. *State ex rel. Mullen v. Howell* 167

3. CONSTITUTIONAL LAW (24) — STATUTES (54) — CONSTRUCTION. A law will not be held unconstitutional unless such holding is compelled. *State ex rel. Mullen v. Howell*..... 167

Construction:

Of statute relating to survival of actions, see ABATEMENT AND REVIVAL, 3.
Of constitutional provisions, see CONSTITUTIONAL LAW, 1, 2.
Of statutes, see CONSTITUTIONAL LAW, 3; STATUTES, 7-11.
Of agency contract guaranteeing credits extended on sale of goods, see GUARANTY.
Of agreement to secure advances for purchase of mining property, see MINES AND MINERALS, 1, 2.
Of verdict, see TRIAL, 4.

Continuance:

1. CONTINUANCE (22)—ABSENCE OF WITNESS—ADMISSION TO PREVENT CONTINUANCE. Under the express provision of Rem. Code, § 2135, a continuance on account of the absence of a witness, is properly denied where the prosecuting attorney admitted that the witness would testify, as claimed, the same as upon a former trial and such testimony was read to the jury. *State v. Conner*..... 571

Contractors:

On state work, see STATES, 2-4.

Contracts:

Action for specific performance, whether legal or equitable, see ACTION.
Alteration, see ALTERATION OF INSTRUMENTS.
Of former administrator in individual capacity, see EXECUTORS AND ADMINISTRATORS, 2.
Agreements within statute of frauds, see FRAUDS, STATUTE OF.
Of guaranty, see GUARANTY.
Of husband and wife, see HUSBAND AND WIFE.
Right of wife to defend in action for breach of contract made by husband, see HUSBAND AND WIFE, 4.
Of indemnity, see INDEMNITY.
Insurance contracts, see INSURANCE, 4.
Agreement to secure advances for purchase of mining property, see MINES AND MINERALS, 1, 2.
Of suretyship, see PRINCIPAL AND SURETY.
Sales of personalty, see SALES.

Contracts—Continued.

Of school board to employ special counsel, see SCHOOLS AND SCHOOL DISTRICTS, 1.

Specific performance, see SPECIFIC PERFORMANCE.

For public work, see STATES, 2-4.

Sale of land, see VENDOR AND PURCHASER.

To furnish water for irrigation, see WATERS AND WATER COURSES. 6, 7.

Contributory Negligence:

Of bailee, as imputed to owner of auto struck by train, see BAILMENT.

As defense to right of action by heirs for wrongful death, see DEATH.

Of husband as negligence of community, see HUSBAND AND WIFE, 3.

Conveyances:

Of personalty as security for debt, see CHATTEL MORTGAGES.

Of mining property, see MINES AND MINERALS.

As security for debt, see MORTGAGES.

Corporations:

See BANKRUPTCY, 6; MUNICIPAL CORPORATIONS.

Conspiracy to defraud, in obtaining subscriptions to corporate stock, see CONSPIRACY.

Condemnation of corporate property for public use, see EMINENT DOMAIN, 2, 3.

Part payment on contract for sale of stock as avoiding statute, see FRAUDS, STATUTE OF, 2.

Gift to wife of corporate stock as separate property, see HUSBAND AND WIFE, 2.

Interest on installments on sale of treasury stock, see INTEREST.

Letter written at main office and sent to branch office as publication of libel, see LIBEL AND SLANDER, 1.

Appointment of receiver for insolvent corporation, see RECEIVERS.

School districts, see SCHOOLS AND SCHOOL DISTRICTS.

1. CORPORATIONS (67, 208, 211)—STOCK—TRANSFERS — INSOLVENCY — PREFERENCES TO OFFICERS. Under the trust fund doctrine, an officer in control of a failing corporation cannot evade his liability for treasury stock which the corporate records show that he purchased by claiming that the apparent sale was only an option, nor can his liability be limited to the prejudice of creditors by any arrangement between himself and the corporation or by a transfer of the shares. *Benner v. Billings*..... 1

2. CORPORATIONS (107, 226)—STOCK—ACTIONS TO ENFORCE—LIABILITY —DEFENSES. In an action by a trustee in bankruptcy to recover the amount due on a sale of treasury stock, the objection that the complaint shows no tender of the stock before suit is not available where

Corporations—Continued.

it is alleged that the stock was sold and delivered. *Benner v. Billings* 1

3. CORPORATIONS (190)—REPRESENTATION BY AGENTS—SLANDER. An insurance corporation is liable for a malicious slander uttered by its auditor and cashier charging a cash clerk with stealing, made upon inspection and checking up his accounts, the same being within the scope of their employment. *Ecuyer v. New York Life Insurance Co.* 411

4. CORPORATIONS (218) — RECEIVERS — GROUNDS — EVIDENCE — SUFFICIENCY. A receiver for a corporation operating a large dairy farm should not be appointed upon the ground of the incompetence and mismanagement of the manager and failure to keep proper accounts and make monthly statements, where it appeared conclusively that, although a young man, he was thoroughly qualified, had conducted it in a businesslike manner, making profits of $9,000 more than in any previous year, and all necessary accounts were properly kept, the books were open to inspection, and a system of monthly statements would entail much labor. *Beeler v. Standard Investment Co.* 442

5. SAME (218)—RECEIVERS (3)—GROUNDS—DISCRETION. While Rem. Code, § 741, gives wide discretion to the superior court to appoint receivers, it was not intended to authorize a receiver for a solvent corporation merely because the minority were dissatisfied with the majority, conducting the corporation in good faith. *Beeler v. Standard Investment Co.* 442

Costs:

Cost of building, as basis for rent, see LANDLORD AND TENANT, 1, 2. Attorney's fees in foreclosure suits, see MORTGAGES.

1. COSTS (45)—WITNESS' FEES. It is an abuse of discretion to refuse to tax costs for witnesses who were present and competent to testify although, because of the manner in which the case was tried, they were not called upon to testify. *Ham, Yearsley & Ryrie v. Northern Pac. R. Co.* 378

2. COSTS (80)—ON APPEAL—IMPROPER ABSTRACT. The appellant will not be allowed costs for an abstract on appeal which was argumentative and partisan and no aid to the court. *In re Johnson's Estate* 25

3. COSTS (83)—ON APPEAL—TAXATION—TIME FOR FILING COST BILLS. Rule 14 of the supreme court (71 Wash., p. ii) providing that the prevailing party shall within ten days after the filing of an opinion, file and serve a cost bill, and that if none is filed, the clerk shall tax certain costs, is mandatory, and a cost bill filed out of time will be struck out unless good grounds are shown for the default; and inadvertence of counsel is not a sufficient legal excuse. *Schwalen v. Fuller & Co.* 476

Counties:

Review of sufficiency of claim against as dependent on objections in lower court, see APPEAL AND ERROR, 5.
Establishment of drains, see DRAINS.
Condemnation of city property for county road, see EMINENT DOMAIN, 2, 3.
Proper placing of lights to guard obstruction in highway as question for jury, see HIGHWAYS.
Purchase of certificates of delinquency by county treasurer, see TAXATION, 2.

Courts:

Review of decisions, see APPEAL AND ERROR.
Supersedeas by supreme court, see APPEAL AND ERROR, 13.
Former decision as law of the case on subsequent appeal, see APPEAL AND ERROR, 26.
Appointment of receiver for corporation, see CORPORATIONS, 4, 5.
Suits for divorce, see DIVORCE.
Judicial notice, see EVIDENCE, 1, 2.
Jurisdiction of offenses by Indians, see INDIANS.
Powers of courts on habeas corpus to secure release from custody of delinquent child, see INFANTS, 2.
Conclusiveness of judgments, see JUDGMENT, 2, 3.
Enforcement of maritime liens, see MARITIME LIENS.
Scope of review by supreme court on application for prohibition, see PROHIBITION.
Appointment of receiver, see RECEIVERS.
Keeping tender good by bringing money into court, see TENDER.

Creditors:

See BANKRUPTCY.
Presentment of claims against estate of decedent, see EXECUTORS AND ADMINISTRATORS, 6-9.

Criminal Law:

Arrest of accused, see ARREST.
Bail, see BAIL.
Conspiracy to defraud, see CONSPIRACY.
Crimes committed by Indians, see INDIANS.
Allegations in indictment, see INDICTMENT AND INFORMATION.
Violation of liquor laws, see INTOXICATING LIQUORS.
Words charging crimes as libelous per se, see LIBEL AND SLANDER, 4.
Malicious prosecution, see MALICIOUS PROSECUTION.

1. CRIMINAL LAW (110, 112)—FALSE PRETENSES (13) — EVIDENCE — OTHER OFFENSES. In a prosecution for larceny by false pretenses as to houses owned by the accused and that he was a contractor and builder, evidence of other instances of larceny committed by accused

Criminal Law—Continued.

by similar false pretenses is admissible, not to show intent, but to prove the falsity of the pretense that he was a contractor and builder, by showing on the contrary that he was engaged in a fraudulent scheme (Modified on Rehearing). *State v. Anderson* 336

2. SAME (110, 112). Such evidence was admissible for the purpose of establishing criminal intent, since the acts charged did not in themselves characterize the offense. *State v. Anderson*..... 336

3. SAME (332)—VERDICT—RECOMMITMENT. Where the verdict is incomplete, failing to find as to a previous conviction, the court may recommit the verdict to the jury with proper instructions. *State v. Dericho* 468

4. SAME (373, 460) — JUDGMENT—CONCLUSIVENESS—SECOND CONVICTION. Under the initiative prohibition act, authorizing increased punishments for subsequent convictions, a former conviction under the act is conclusive and may not be collaterally attacked by showing that the accused was not guilty. *State v. Dericho*..... 468

5. CRIMINAL LAW (444) — INDICTMENT AND INFORMATION (111) — HARMLESS ERROR. A negative pregnant in an information charging larceny by false pretenses is not ground for setting aside a conviction. *State v. Anderson*..... 336

6. CRIMINAL LAW (452, 453)—APPEAL—HARMLESS ERROR—INSTRUCTIONS. In a prosecution for prescribing intoxicating liquor after being twice convicted of violating the prohibition law, an erroneous general statement of the law as to his right to issue any prescriptions is not prejudicial, where other instructions plainly restricted the consideration of the jury to prescriptions for intoxicating liquor. *State v. Emonds*..... 688

7. CRIMINAL LAW (460)—PUNISHMENT—SUBSEQUENT OFFENSES. In a second prosecution under the initiative prohibition act, the jury is properly instructed to find whether accused was formerly convicted, in order to empower the court to impose the increased punishment. *State v. Dericho*..... 468

Crops:

Accounting by cotenant for, see TENANCY IN COMMON, 2.

Cross-Complaint:

See PLEADING, 2.

Crossings:

Collision with auto at street crossing, see MUNICIPAL CORPORATIONS, 5. Accident at railroad crossing, see NEGLIGENCE, 3.

Custodia Legis:

Garnishment of property in custody of the law, see GARNISHMENT, 1.

Custody:

Support and custody of children, see DIVORCE, 7, 8.
Of delinquent child, see INFANTS.

Damages:

Specific performance as action for damages, see ACTION.
On decreeing cancellation of instruments, see CANCELLATION OF INSTRUMENTS, 2.
Of condemnation of property taken for public use, see EMINENT DOMAIN, 5-8.
Action for damages for breach of contract by husband, right of wife to defend, see HUSBAND AND WIFE, 4.
For libel or slander, see LIBEL AND SLANDER, 3-6.
Injuries from public improvements, see MUNICIPAL CORPORATIONS, 2, 3.
Pleading items of damage, variance, see PLEADING, 3.
For delay in performing contract, see SALES, 3.
For failure to furnish water for irrigation, see WATERS AND WATER COURSES, 7.

Dams:

Degree of care in construction and operation of, see WATERS AND WATER COURSES, 2-5.

Death:

Of party as ground for abatement, see ABATEMENT AND REVIVAL, 2-5.
Wrongful death of person shot by deputy sheriff in attempting to make arrest, see SHERIFFS AND CONSTABLES.

1. DEATH (9)—RIGHT OF ACTION—DEFENSES — CONTRIBUTORY NEGLIGENCE OF DECEASED. Rem. Code, § 183, giving to heirs a right of action for the death of a person caused by the "wrongful act or neglect" of another, refers to wrong or neglect as against the deceased; hence no recovery is given where the deceased was guilty of contributory negligence. *Ostheller v. Spokane & Inland Empire R. Co.* 678

2. DEATH (9) — RIGHT OF ACTION — DEFENSES—CONTRIBUTORY NEGLIGENCE OF DECEASED. In an action for wrongful death, the contributory negligence of the husband, resulting in the instantaneous death of both husband and wife, is the contributory negligence of the community and hence precludes recovery by the heirs for wrongful death of the wife as well as the husband. *Ostheller v. Spokane & Inland Empire R. Co.* 678

Debt:

Foreclosure by mortgagee for insecurity of debt, see CHATTEL MORTGAGES, 4, 5.

Debtor and Creditor:

See BANKRUPTCY.

Decedents:

Estates, see EXECUTORS AND ADMINISTRATORS.
Testimony as to transactions with persons since deceased, see WITNESSES.

Deceit:

Abatement of action for, by death, see ABATEMENT AND REVIVAL, 5.

Decision:

Review on appeal, see APPEAL AND ERROR, 1-4.

Deeds:

Alteration, see ALTERATION OF INSTRUMENTS.
Cancellation, see CANCELLATION OF INSTRUMENTS.
Estoppel of grantee to assert sole title, see ESTOPPEL.
To secure advances for purchase of mining property, see MINES AND MINERALS, 1, 2.
Reformation, see REFORMATION OF INSTRUMENTS.

Defamation:

See LIBEL AND SLANDER.

Default:

Denial of right of forfeiture of mining lease for default in payment of royalties, see EQUITY.
Vacation of default judgment for void or defective summons, see JUDGMENT, 1.

Defect:

Of parties plaintiff, see PARTIES.

Delay:

In filing statement of facts, see APPEAL AND ERROR, 17.
In filing cost bill on appeal, see COSTS, 3.
Damages for delay in performing contract, see SALES, 3.

Delegation:

Of master's duty to servant, see MASTER AND SERVANT, 1.

Delinquent Child:

Custody and control of, see INFANTS.

Delinquent Taxes:

Sale and foreclosure for nonpayment of taxes, see TAXATION, 1, 2.

Delivery:

Of deed, see ALTERATION OF INSTRUMENTS, 2.
Of policy to insured while in good health, see INSURANCE, 5-7.
Of materials to contractor on public work, see STATES, 4.

Demand:

Presumption as to, in aid of judgment of replevin, see APPEAL AND ERROR, 16.
By plaintiff for performance, see SPECIFIC PERFORMANCE, 3.

Denials:

In pleading, see PLEADING, 2.

Deposits:

Of cash in lieu of bail, see BAIL.

Deposits in Court:

Tender and keeping tender good by deposits in court, see TENDER.

Descent and Distribution:

Inheritance and transfer taxes, see TAXATION, 3.

Description:

Of property, sufficient to answer statute of frauds, see FRAUDS, STATUTE OF, 3, 4.

Disbarment:

Of attorney, see ATTORNEY AND CLIENT.

Discharge:

See BANKRUPTCY.
Of mortgage indebtedness, application of payments, see CHATTEL MORTGAGES, 6, 7.
From liability as surety, see PRINCIPAL AND SURETY.

Discretion of Court:

In appointment of receiver, see CORPORATIONS, 5.
Reopening case for further evidence, see TRIAL, 1.

Dismissal and Nonsuit:

Dismissal of appeal for delay in filing transcript, see APPEAL AND ERROR, 19.
Dismissal of proceedings against delinquent child for delay in trial, see INFANTS, 1.

Dissolution:

As condition precedent to action by copartner to recover advances to partnership, see PARTNERSHIP, 1.

Distribution:

Of estate of decedent, see EXECUTORS AND ADMINISTRATORS, 10.

Districts:

Drainage districts, see DRAINS.
Waterway districts, assessment of benefits from, see NAVIGABLE WATERS.
School districts, see SCHOOLS AND SCHOOL DISTRICTS.

Ditches:

See DRAINS.
Prescriptive right to use of ditch for irrigation, see WATERS AND WATER COURSES, 1.

Diversion:

Of waters for irrigation, see WATERS AND WATER COURSES, 1.

Division:

Of property on divorce, see DIVORCE, 5, 6.

Divorce:

Appealability of order reducing alimony, see APPEAL AND ERROR, 4.
Retroactive operation of laws, see STATUTES, 7, 10.

1. DIVORCE (8)—GROUNDS—INABILITY TO LIVE TOGETHER. Where a wife was quarrelsome and such incompatibility of temperament existed between the parties that they could no longer live together as husband and wife, the court properly granted a divorce to the husband. *Freeburn v. Freeburn*..... 646

2. DIVORCE (9) — DESERTION — RECONCILIATION — GOOD FAITH — EVIDENCE—SUFFICIENCY. In a husband's action for divorce, after decree for separate maintenance for his fault, his mere word is not sufficient to sustain the burden of proof that his offer to resume relations was made in good faith and not for the purpose of laying a foundation for his divorce action, where there was direct conflict in the testimony. *Appleton v. Appleton*..... 280

3. DIVORCE (50-1) — JUDGMENT — CONCLUSIVENESS. The denial of a divorce to a husband upon the ground that he was at fault and had caused the separation is conclusive and a bar to a second action by him upon the ground of estrangement and inability to live together. *Pierce v. Pierce*..... 125

4. DIVORCE (67)—SUIT MONEY—AMOUNT. The allowances for suit money being largely discretionary, an allowance of $2,000 for the defense of an action in which the traveling expenses of defendant and her witnesses was more than $800, will not be disturbed. *Pierce v. Pierce* 125

Divorce—Continued.

5. SAME (80)—DIVISION OF PROPERTY. Upon granting a divorce, the wife should not be restricted to a mere life interest in the home subject to taxes and upkeep which might be more than its use would be worth, but should be given the fee. *Freeburn v. Freeburn*... 646

6. SAME (80). Upon granting a divorce, the proceeds of an advantageous contract, made after marriage, under which the husband was to receive large dividends from the operation of a mine until 1920, should be regarded as community property and the wife should have a half interest therein; but whether the contract will be renewed rests upon speculation, and the proceeds under any such renewal would be his separate property and should not be considered in the division. *Freeburn v. Freeburn*..... 646

7. DIVORCE (100, 104)—CUSTODY OF CHILDREN — MODIFICATION — EVIDENCE AS TO WELFARE. A decree of divorce awarding the custody of children of a grossly delinquent mother to the father, should not, on the remarriage of both parties, be modified and their custody awarded to the mother, where there is no question, from a material point of view, that the father's home is to be preferred for the welfare of the children, and the influence of the mother would be prejudicial to their best interests. *Smith v. Frates*..... 13

8. DIVORCE (104) — CUSTODY OF CHILD — MODIFICATION — NOTICE. Upon application to change the custody of a child, awarded to a father who, at the time of the application, was a member of the American Expeditionary Force in France, it is error not to postpone the hearing until he had returned from military service. *Clark v. Clark* 475

Docks:

Duty of owner of premises, see NEGLIGENCE, 1.

Drains:

1. DRAINS (16-1)—ASSESSMENT—BENEFITS TO PROPERTY—APPORTIONMENT — RAILROAD RIGHT OF WAY. An assessment for a drainage ditch against a railroad right of way is not upon a fundamentally wrong basis and arbitrarily excessive although it averages $235 per acre, while bordering farm lands were assessed at $15 per acre and county highways at about $90 per acre, where the assessments were arrived at by concluding that the total benefits were three times the total cost of the improvement, and farm lands were charged one-third of the increased market value, while railroad right of way and county highways were held to be benefited in a certain sum each, one-third of which was assessed against them, in lieu of attempting to determine the increased market value, upon the theory that it was impracticable to so measure benefits to such property; in view of the fact that the evidence tended to show that the ditch very materially contributed to the improved condition of the road-

Drains—Continued.

bed making it suitable for heavier traffic. *Northern Pac. R. Co. v. Board of County Commissioners* 264

2. SAME (18)—ASSESSMENTS—BENEFITS TO PROPERTY—REVIEW. There being, under Rem. Code, § 4226-30, no appeal from the decision of the county commissioners apportioning assessments upon the property in a drainage district benefited by the construction of a drainage ditch, the decision being final, there is a stronger presumption supporting the apportionment of benefits than in the cases of city local improvement assessments from which appeal may be taken to the courts. *Northern Pac. R. Co. v. Board of County Commissioners* 264

Duplicity:

In information, see INDICTMENT AND INFORMATION, 3.

Easements:

1. EASEMENTS (13)—WAY OF NECESSITY. On the sale of part of a tract, cut off from access, an easement or right of way by necessity over the grantor's other land is implied. *State ex rel. Carlson v. Superior Court* 228

Election:

By mortgagee to foreclose before maturity of debt, see CHATTEL MORTGAGES, 4 5.

Elections:

For issue of school bonds, see SCHOOLS AND SCHOOL DISTRICTS, 2.
Referendum on legislative action approving amendment to Federal constitution, see STATUTES, 1, 3.

Emergency:

Acts of driver of auto as excuse for negligence, see MUNICIPAL CORPORATIONS, 4, 6.

Eminent Domain:

1. EMINENT DOMAIN (15, 39)—PRIVATE WAY OF NECESSITY—EVIDENCE—SUFFICIENCY. Under Rem. Code, § 5871-1, giving the right to condemn a private way of necessity where it is necessary for the proper use and enjoyment of premises, the burden on the petitioner to show a reasonable necessity is not satisfied by proof that the way sought is his most practicable way of egress and ingress, where he had a present right of way by grant over other premises which much of the testimony showed was capable of being made passable at some inconvenience and added expense, yet within bounds; the statute not being favored in law and the rule of necessity more strict between private owners than for public service companies. *State ex rel. Carlson v. Superior Court* 228

Eminent Domain—Continued.

2. EMINENT DOMAIN (29) — PROPERTY SUBJECT — CITY PROPERTY. Since the right of eminent domain does not exist by implication but must be expressly given by statute, a county has no right to condemn, for a county road, city property either within or without the city limits; notwithstanding Rem. Code, § 5879-18, giving counties the right to condemn lands in a city for the construction of permanent highways, the act not authorizing the condemnation of property of the city. *State ex rel. Cle Elum v. Kittitas County*..... 326

3. SAME (29). The fact that property of a city is not now all being devoted to a public use does not authorize its condemnation by another public corporation. *State ex rel. Cle Elum v. Kittitas County* 326

4. EMINENT DOMAIN (48)—TAXATION—SPECIAL ASSESSMENTS. Since Const., art. 7, § 9, expressly limits the levy of special assessments for local improvements to property benefited, there can be no greater charge made than a sum equal to the benefits received; for otherwise there would be a taking of property without compensation in violation of art. 1, § 16 (Held obiter, on rehearing En Banc). *Behrens v. Commercial Waterway District No. 1*..... 155

5. SAME (78)—COMPENSATION—IMPROVEMENTS. In eminent domain proceedings, owners of a dam site impounding the waters of a lake, who, without any right to the waters, built a dam and storage works pending litigation over the right to the waters, acted at their peril and are not entitled to recover the cost price of their improvements as part of their damages, but are limited to the market value of their property, including whatever the improvements may add to its fair market value for any and all purposes at the time of the trial. *Ham, Yearsley & Ryrie v. Northern Pac. R. Co*..... 378

6. SAME (80, 126, 136)—COMPENSATION—VALUE FOR SPECIAL USE—EVIDENCE—INSTRUCTIONS. In condemnation of property for a dam site which is improved by a dam impounding waters for irrigation, it is proper to show its condition, the uses to which it has been applied, and its availability and capacity for other uses, and whatever the improvements may add to its fair market value for all purposes, so that it is error to instruct that its value as a dam site cannot be considered; but the fact that it is needed for the particular object sought by the condemnation is not an element of the value. *Ham, Yearsley & Ryrie v. Northern Pac. R. Co*..... 378

7. EMINENT DOMAIN (84) — COMPENSATION — MARKET VALUE. The fair and reasonable market value at the time of the trial is the basis for compensation in condemnation proceedings. *Ham, Yearsley & Ryrie v. Northern Pac. R. Co*..... 378

8. SAME (84). The market value is the price it will bring when offered for sale by one who desires but is not obliged to sell, and is bought by one under no necessity of buying. *Ham, Yearsley & Ryrie v. Northern Pac. R. Co*..... 378

Employees:

See MASTER AND SERVANT.

Epidemic:

As excuse for delay in filing statement of facts, see APPEAL AND ERROR, 17.

Equity:

See CANCELLATION OF INSTRUMENTS; REFORMATION OF INSTRUMENTS; SPECIFIC PERFORMANCE.

Nature of equitable suit as distinguished from action at law, see ACTION.

Equitable interest in note as subject to execution, see EXECUTION.

Jurisdiction in action to foreclose lien for construction of ship, see MARITIME LIENS.

Accounting by cotenant, see TENANCY IN COMMON.

1. EQUITY (19) — MINES AND MINERALS (17) — FORFEITURES — COAL MINE LEASE. While equity may forfeit a coal mine lease for default in the payment of a few months' royalties, it will leave the lessor to his remedy at law, where the amount involved was small, the lease had a long time to run, valuable improvements had been made, and the default was due to a mistake in the lessee's construction of the contract. *Harlan v. McGraw*..... 286

Escape:

Authority of police officers to kill person attempting to escape, see ARREST.

Establishment:

Of drains, see DRAINS.

Estates:

Estates of deceased persons, see EXECUTORS AND ADMINISTRATORS.

Tenancy in common, see TENANCY IN COMMON.

Estoppel:

By judgment, see JUDGMENT, 2, 3.

1. ESTOPPEL (20-23) — PREJUDICE TO PERSON SETTING UP ESTOPPEL. The grantee in a deed, which was recorded with an interlineation naming a woman as his wife as an additional grantee, is not estopped to assert sole title by the fact that he lived on the premises with the woman as his wife, and permitted her to occupy and use it as a home during his absence; nor by the fact that the two joined as husband and wife in a mortgage upon the premises to secure part of the purchase price; as it does not appear that she was misled to her prejudice. *Engstrom v. Peterson*..... 523

Eviction:

Of tenant, see LANDLORD AND TENANT, 3, 4.

Evidence:

As to time of making interlineation in deed, see ALTERATION OF INSTRUMENTS, 1, 2.
Review of rulings as dependent on presentation of objection or exception in lower court, see APPEAL AND ERROR, 6, 7.
Necessity for incorporating evidence in bill of exceptions or statement of facts, see APPEAL AND ERROR, 15.
In disbarment proceedings, see ATTORNEY AND CLIENT.
Of fraud by chattel mortgagees, see BANKRUPTCY, 3.
In suit for cancellation of deed, see CANCELLATION OF INSTRUMENTS, 1.
Against carrier for loss of or injury to goods, see CARRIERS.
To show conspiracy to defraud, see CONSPIRACY.
For appointment of receiver for solvent corporation, see CORPORATIONS, 4.
Other offenses, see CRIMINAL LAW, 1, 2.
In suit for divorce, see DIVORCE, 2, 7.
Condemnation proceedings, see EMINENT DOMAIN, 1, 6.
For reasonable increase in gas rates, see GAS, 3.
Separate property of married women, see HUSBAND AND WIFE, 2.
Creation and existence of agency for insurer, see INSURANCE, 1, 2.
Health of insured at time of delivery of policy, see INSURANCE, 5.
In prosecution for violating prohibition act, see INTOXICATING LIQUORS, 3, 4.
For libel and slander, see LIBEL AND SLANDER, 2.
For malicious prosecution, see MALICIOUS PROSECUTION.
Scope of employment, see MASTER AND SERVANT, 7-9.
In action for damages for removal of lateral support, see MUNICIPAL CORPORATIONS, 2, 3.
In action for injuries to person in city street, see MUNICIPAL CORPORATIONS, 6.
Newly discovered evidence as ground for new trial, see NEW TRIAL.
Admissibility of evidence under pleading, see PLEADING, 3.
Fraud of agent in trade of lands, see PRINCIPAL AND AGENT.
For injuries to trespasser on railroad train, see RAILROADS, 2.
In action for wrongful death in attempting to make arrest, see SHERIFFS AND CONSTABLES.
Of demand and refusal to perform, see SPECIFIC PERFORMANCE, 3.
Of delivery of materials to contractor on public work, see STATES, 4.
Reopening case for further evidence, see TRIAL, 1.
Value of property taken, see USURY.
Of damage from failure to furnish water for irrigation, see WATERS AND WATER COURSES, 7.
Admissibility of evidence as to transactions with decedent, see WITNESSES.

1. EVIDENCE (4, 4-1) — JUDICIAL NOTICE — GEOGRAPHICAL FACTS AND SURVEYS. The courts recognize abbreviations used in official government surveys and take judicial notice of the base and meridian lines

Evidence—Continued.

and the location and number of the townships and ranges east or west within the state. *Schmidt v. Powell*..... 53

2. SAME (4). The superior court of a county will take judicial notice of the location of a town within its jurisdiction. *Schmidt v. Powell*..... 53

3. EVIDENCE (21)—PRESUMPTIONS. A presumption can be legally indulged in only when the facts giving rise to it are proved by direct evidence, not when they rest upon a presumption. *Johnson v. Western Express Co*..... 339

4. EVIDENCE (34)—BURDEN OF PROOF—SHIFTING. The making of a *prima facie* case by plaintiff does not of itself result in the shifting of the burden of proof as to any facts which are necessary to sustain the plaintiff's right of recovery not admitted by the defendant, though defendant admitted facts raising presumptions making a *prima facie* case for plaintiff. *Singer v. Metz Co*..... 562

5. EVIDENCE (214)—OPINIONS—BASIS OF. It is improper to ask experts hypothetical questions based on theoretical conjecture of the witnesses. *Blomskog, Erickson & Cotton v. Seattle*..... 471

Examination:

Of expert witness, see EVIDENCE, 5.
Of insured under oath, see INSURANCE, 9, 10.

Exceptions:

Necessity of, for purposes of review, see APPEAL AND ERROR, 6-9.
In statutes, see STATUTES, 8.

Exceptions, Bill of:

Necessity for purpose of review, see APPEAL AND ERROR, 14-16.

Excessive Damages:

In action for slander or libel, see LIBEL AND SLANDER, 5.

Exchange of Property:

Liability of agent for profits, see PRINCIPAL AND AGENT.

Excuse:

For delay in filing statement of facts, see APPEAL AND ERROR, 17.
For delay in filing cost bill on appeal, see COSTS, 3.

Execution:

1. EXECUTION (10)—PROPERTY SUBJECT—EQUITABLE INTEREST IN NOTE. The equitable or reversionary interest of the payee of a promissory note, pledged by him as security for a debt, may be sold on execution, under Rem. Code, § 518, providing that all property of the judgment debtor not exempt by law shall be liable to execution. *Gordon v. Hillman*..... 490

Executors and Administrators:

1. EXECUTORS AND ADMINISTRATORS—SETTLEMENT—INTEREST. Interest is properly allowable upon the balance due in the hands of the administrator at the legal rate, and payments to legatee must be credited as of the time made. *In re Johnston's Estate*..... 25

2. EXECUTORS AND ADMINISTRATORS (42-1, 45)—CONTRACTS—SALE TO ADMINISTRATOR IN INDIVIDUAL CAPACITY. An administrator *de bonis non* is not liable for apple boxes and goods, alleged to have been purchased by a former administrator and used in marketing crops, where they were sold to him upon his individual credit, and not as administrator, and no claim therefor was filed against the estate. *Lamb-Davis Lumber Co. v. Stowell*..... 212

3. EXECUTORS AND ADMINISTRATORS (42-45)—SALES—RESPONSIBILITY OF ADMINISTRATOR. The intent of Rem. Code, § 1545, providing that an administrator shall not be responsible for loss in selling property at less than its appraised value, if the sale has been justly made, is to make him responsible only when a sale has been unjustly made, and not when irregularly made. *In re Johnston's Estate*.. 25

4. SAME (42-45). A sale by an administrator of lots, subject to mortgage that was being foreclosed, is not unjustly made, within Rem. Code, § 1545, although the sales were irregular and for much less than the appraised value, when, considering the incumbrance and the state of the market, it was probably the only course that would have enabled the estate to realize anything out of the property; and he therefore is not responsible for the loss in selling at less than the appraised value. *In re Johnston's Estate*..... 25

5. SAME (56, 57, 157)—SETTLEMENT—APPRAISED VALUE. An administrator should not be charged with the appraised value ($100,000) of corporate stock having no market value, the corporation being in difficulty and shortly a bankrupt, where it was held with consent of the heirs in the hope that it might become valuable, and where the administrator by pledging the stock to the corporation, realized $7,500 in cash and obtained a discharge of the corporation's claim against the estate amounting to $14,000 additional; notwithstanding irregularities in his proceedings. *In re Johnston's Estate* 25

6. EXECUTORS AND ADMINISTRATORS (72)—CLAIMS—NECESSITY. The statute of nonclaim, Laws 1917, p. 673, § 107, is mandatory and requires that claims against estates be presented within six months. *First Security & Loan Co. v. Englehart*..... 86

7. SAME (72)—CLAIMS—NECESSITY—UNDER NONINTERVENTION WILLS. Creditors of estates under nonintervention wills must present claims, in view of the Probate Code, Laws 1917, p. 666, § 92, requiring such executors to give notice to creditors and to pay claims within one year thereafter, and Id., p. 673, § 107, requiring every executor to give notice to creditors to present claims within six months, and

Executors and Administrators—Continued.

barring all claims not so presented. *First Security & Loan Co. v. Englehart* 86

8. SAME (81)—CLAIMS—STATEMENT AND VERIFICATION. Under Probate Code, Laws 1917, p. 673, § 108, requiring every claim filed to be supported by affidavit, an unsupported claim is ineffectual. *First Security & Loan Co. v. Englehart*..... 86

9. SAME (83, 159-1)—CLAIMS—FAILURE TO PRESENT—LIABILITY TO DISTRIBUTEES. An administrator will not be held in his final accounting for the amount of two claims against the estate which were not presented within the year limited to creditors, and other claims not indorsed as approved, where such claims were held back to assist the estate through financial difficulties until claimants were advised that the administrator was prepared to pay, and where the payment was twice approved by the court, and under the circumstances the petitioners should not be permitted to profit by the irregularity. *In re Johnston's Estate*..... 25

10. EXECUTORS AND ADMINISTRATORS (104) — JUDGMENT (100, 109) — VACATION — ORDER APPROVING ACCOUNT — IRREGULARITIES. The fact that an order approving an administrator's final account and decree of distribution is appealable as a final order to correct error of law does not limit the force of Rem. Code, § 464, authorizing its vacation or modification for irregularities in obtaining it in reciting the approval of claims and payment thereof not then disclosed by the record. *In re Johnston's Estate*..... 25

11. SAME (157)—SETTLEMENT—APPRAISEMENT. An administrator *de bonis non* is not responsible on his final accounting for the amount of an unexplained penciled memorandum "money $631.49" in the inventory, which was a duplicate of the inventory theretofore filed, the only fair inference from the record being that it was money realized from the other property inventoried. *In re Johnston's Estate* 25

12. SAME (160)—COUNSEL FEES. The allowance of $1,025 for fees of an attorney for an executrix of an estate, appraised at $144,000, is excessive and should be reduced to $500, where $115,000 of the appraised property proved to be of little or no value. *In re Johnston's Estate* 25

13. SAME (160-1)—COMPENSATION—RIGHT TO. An administrator is not to be deprived of his statutory compensation by reason of irregularities, where he was not guilty of fraud and administered the estate with great ability and resourcefulness in the face of financial difficulties. *In re Johnston's Estate*..... 25

14. SAME (165)—COMPENSATION—RATES AND COMPUTATION. The appraised value of the estate is only the *prima facie* value for figuring an administrator's statutory commissions, which should be based upon the total cash received from all sources, plus the value of real

Divorce—Continued.

5. SAME (80)—DIVISION OF PROPERTY. Upon granting a divorce, the wife should not be restricted to a mere life interest in the home subject to taxes and upkeep which might be more than its use would be worth, but should be given the fee. *Freeburn v. Freeburn*... 646

6. SAME (80). Upon granting a divorce, the proceeds of an advantageous contract, made after marriage, under which the husband was to receive large dividends from the operation of a mine until 1920, should be regarded as community property and the wife should have a half interest therein; but whether the contract will be renewed rests upon speculation, and the proceeds under any such renewal would be his separate property and should not be considered in the division. *Freeburn v. Freeburn*..... 646

7. DIVORCE (100, 104)—CUSTODY OF CHILDREN — MODIFICATION — EVIDENCE AS TO WELFARE. A decree of divorce awarding the custody of children of a grossly delinquent mother to the father, should not, on the remarriage of both parties, be modified and their custody awarded to the mother, where there is no question, from a material point of view, that the father's home is to be preferred for the welfare of the children, and the influence of the mother would be prejudicial to their best interests. *Smith v. Frates*..... 13

8. DIVORCE (104) — CUSTODY OF CHILD — MODIFICATION — NOTICE. Upon application to change the custody of a child, awarded to a father who, at the time of the application, was a member of the American Expeditionary Force in France, it is error not to postpone the hearing until he had returned from military service. *Clark v. Clark* 475

Docks:

Duty of owner of premises, see NEGLIGENCE, 1.

Drains:

1. DRAINS (16-1)—ASSESSMENT—BENEFITS TO PROPERTY—APPORTIONMENT — RAILROAD RIGHT OF WAY. An assessment for a drainage ditch against a railroad right of way is not upon a fundamentally wrong basis and arbitrarily excessive although it averages $235 per acre, while bordering farm lands were assessed at $15 per acre and county highways at about $90 per acre, where the assessments were arrived at by concluding that the total benefits were three times the total cost of the improvement, and farm lands were charged one-third of the increased market value, while railroad right of way and county highways were held to be benefited in a certain sum each, one-third of which was assessed against them, in lieu of attempting to determine the increased market value, upon the theory that it was impracticable to so measure benefits to such property; in view of the fact that the evidence tended to show that the ditch very materially contributed to the improved condition of the road-

Drains—Continued.

bed making it suitable for heavier traffic. *Northern Pac. R. Co. v. Board of County Commissioners* 264

2. SAME (18)—ASSESSMENTS—BENEFITS TO PROPERTY—REVIEW. There being, under Rem. Code, § 4226-30, no appeal from the decision of the county commissioners apportioning assessments upon the property in a drainage district benefited by the construction of a drainage ditch, the decision being final, there is a stronger presumption supporting the apportionment of benefits than in the cases of city local improvement assessments from which appeal may be taken to the courts. *Northern Pac. R. Co. v. Board of County Commissioners* 264

Duplicity:

In information, see INDICTMENT AND INFORMATION, 3.

Easements:

1. EASEMENTS (13)—WAY OF NECESSITY. On the sale of part of a tract, cut off from access, an easement or right of way by necessity over the grantor's other land is implied. *State ex rel. Carlson v. Superior Court* 228

Election:

By mortgagee to foreclose before maturity of debt, see CHATTEL MORTGAGES, 4 5.

Elections:

For issue of school bonds, see SCHOOLS AND SCHOOL DISTRICTS, 2.
Referendum on legislative action approving amendment to Federal constitution, see STATUTES, 1, 3.

Emergency:

Acts of driver of auto as excuse for negligence, see MUNICIPAL CORPORATIONS, 4, 6.

Eminent Domain:

1. EMINENT DOMAIN (15, 39)—PRIVATE WAY OF NECESSITY—EVIDENCE—SUFFICIENCY. Under Rem. Code, § 5871-1, giving the right to condemn a private way of necessity where it is necessary for the proper use and enjoyment of premises, the burden on the petitioner to show a reasonable necessity is not satisfied by proof that the way sought is his most practicable way of egress and ingress, where he had a present right of way by grant over other premises which much of the testimony showed was capable of being made passable at some inconvenience and added expense, yet within bounds; the statute not being favored in law and the rule of necessity more strict between private owners than for public service companies. *State ex rel. Carlson v. Superior Court* 228

Eminent Domain—Continued.

2. EMINENT DOMAIN (29) — PROPERTY SUBJECT — CITY PROPERTY. Since the right of eminent domain does not exist by implication but must be expressly given by statute, a county has no right to condemn, for a county road, city property either within or without the city limits; notwithstanding Rem. Code, § 5879-18, giving counties the right to condemn lands in a city for the construction of permanent highways, the act not authorizing the condemnation of property of the city. *State ex rel. Cle Elum v. Kittitas County*..... 326

3. SAME (29). The fact that property of a city is not now all being devoted to a public use does not authorize its condemnation by another public corporation. *State ex rel. Cle Elum v. Kittitas County* 326

4. EMINENT DOMAIN (48)—TAXATION—SPECIAL ASSESSMENTS. Since Const., art. 7, § 9, expressly limits the levy of special assessments for local improvements to property benefited, there can be no greater charge made than a sum equal to the benefits received; for otherwise there would be a taking of property without compensation in violation of art. 1, § 16 (Held obiter, on rehearing En Banc). *Behrens v. Commercial Waterway District No. 1*..... 155

5. SAME (78)—COMPENSATION—IMPROVEMENTS. In eminent domain proceedings, owners of a dam site impounding the waters of a lake, who, without any right to the waters, built a dam and storage works pending litigation over the right to the waters, acted at their peril and are not entitled to recover the cost price of their improvements as part of their damages, but are limited to the market value of their property, including whatever the improvements may add to its fair market value for any and all purposes at the time of the trial. *Ham, Yearsley & Ryrie v. Northern Pac. R. Co*..... 378

6. SAME (80, 126, 136)—COMPENSATION—VALUE FOR SPECIAL USE—EVIDENCE—INSTRUCTIONS. In condemnation of property for a dam site which is improved by a dam impounding waters for irrigation, it is proper to show its condition, the uses to which it has been applied, and its availability and capacity for other uses, and whatever the improvements may add to its fair market value for all purposes, so that it is error to instruct that its value as a dam site cannot be considered; but the fact that it is needed for the particular object sought by the condemnation is not an element of the value. *Ham, Yearsley & Ryrie v. Northern Pac. R. Co*..... 378

7. EMINENT DOMAIN (84) — COMPENSATION — MARKET VALUE. The fair and reasonable market value at the time of the trial is the basis for compensation in condemnation proceedings. *Ham, Yearsley & Ryrie v. Northern Pac. R. Co*..... 378

8. SAME (84). The market value is the price it will bring when offered for sale by one who desires but is not obliged to sell, and is bought by one under no necessity of buying. *Ham, Yearsley & Ryrie v. Northern Pac. R. Co*..... 378

Employees:

See MASTER AND SERVANT.

Epidemic:

As excuse for delay in filing statement of facts, see APPEAL AND ERROR, 17.

Equity:

See CANCELLATION OF INSTRUMENTS; REFORMATION OF INSTRUMENTS; SPECIFIC PERFORMANCE.

Nature of equitable suit as distinguished from action at law, see ACTION.

Equitable interest in note as subject to execution, see EXECUTION.

Jurisdiction in action to foreclose lien for construction of ship, see MARITIME LIENS.

Accounting by cotenant, see TENANCY IN COMMON.

1. EQUITY (19) — MINES AND MINERALS (17) — FORFEITURES — COAL MINE LEASE. While equity may forfeit a coal mine lease for default in the payment of a few months' royalties, it will leave the lessor to his remedy at law, where the amount involved was small, the lease had a long time to run, valuable improvements had been made, and the default was due to a mistake in the lessee's construction of the contract. *Harlan v. McGraw*..... 286

Escape:

Authority of police officers to kill person attempting to escape, see ARREST.

Establishment:

Of drains, see DRAINS.

Estates:

Estates of deceased persons, see EXECUTORS AND ADMINISTRATORS.

Tenancy in common, see TENANCY IN COMMON.

Estoppel:

By judgment, see JUDGMENT, 2, 3.

1. ESTOPPEL (20-23) — PREJUDICE TO PERSON SETTING UP ESTOPPEL. The grantee in a deed, which was recorded with an interlineation naming a woman as his wife as an additional grantee, is not estopped to assert sole title by the fact that he lived on the premises with the woman as his wife, and permitted her to occupy and use it as a home during his absence; nor by the fact that the two joined as husband and wife in a mortgage upon the premises to secure part of the purchase price; as it does not appear that she was misled to her prejudice. *Engstrom v. Peterson*..... 523

Eviction:

Of tenant, see LANDLORD AND TENANT, 3, 4.

Guaranty—Continued.

1. GUARANTY (9)—CONSTRUCTION—AGENCY CONTRACT—SCOPE AND EXTENT OF LIABILITY. There was no sale by the agent, within the meaning of an agency contract for the sale of goods whereby the agent guaranteed credits extended, where the agency contract forbade credit exceeding $1,500, and required the agent to recoup the principal for all losses in excess of three-fourths of one per cent, and it appears that, upon the agent's request for authority to make a "close out sale" to a certain customer greatly exceeding the credit limitation, the principal held the matter up pending its own investigation of the credit and finally wired the agent to deliver the goods. *Raley v. Schram & Ware*..... 406

Habeas Corpus:

To secure release from custody of delinquent child, see INFANTS, 2.

Harmless Error:

In criminal prosecutions, see CRIMINAL LAW, 6.

Health:

Delivery of policy to insured while in good health, see INSURANCE, 5-7.

Hearing:

By public service commission on application to fix gas rates, see GAS.

Heirs:

Right of action for wrongful death, see DEATH.

Highways:

Appropriation of land for highways, see EMINENT DOMAIN, 2, 3.

1. HIGHWAYS (62, 67)—OBSTRUCTIONS—LIGHTS AND BARRIERS—QUESTION FOR JURY. Where an obstruction of a highway existed where a great many automobiles passed at considerable speed, the county was under obligation to so place and protect lights that they would not be liable to be destroyed by passing automobiles; and whether it did so was a question for the jury where lights placed by the county had been twice destroyed a short time preceding plaintiff's injury; and it was error to decide the question as a matter of law. *Brengman v. King County*..... 306

Husband and Wife:

Divorce and judicial separation, see DIVORCE.

1. HUSBAND AND WIFE (47) — COMMUNITY PROPERTY — EXISTENCE OF COMMUNITY. Property acquired by a man and woman not married, but living together as husband and wife, is not community property, and, in the absence of any trust relation, belongs to the one in whose name the legal title stands. *Engstrom v. Peterson*..... 523

Husband and Wife—Continued.

2. HUSBAND AND WIFE (60, 65)—GIFTS (8)—COMMUNITY PROPERTY—EVIDENCE—SUFFICIENCY. Evidence that a husband delivered stock to his wife with the intent of making a gift, and that she received and continued to keep it in her possession and exercised and claimed ownership, sustains the burden of proving that it was voluntarily made and that the stock became her separate property. *In re Bushnell's Estate* 331

3. HUSBAND AND WIFE (86, 87) — COMMUNITY PROPERTY—RIGHT OF ACTION—PERSONAL INJURIES—DEFENSES. The community of husband and wife being a legal entity in which title to property acquired is vested, the right of recovery for personal injuries is in the community alone and the contributory negligence of the husband is the negligence of the community. *Ostheller v. Spokane & Inland Empire R. Co.* 678

4. HUSBAND AND WIFE (88)—COMMUNITY PROPERTY—ACTIONS—RIGHT OF WIFE TO DEFEND. In an action for damages for breach of a contract made by a husband for the sale of personal property, the wife is not entitled to separately answer and show that the property was her separate property, where no judgment was sought against her individually or affecting her separate estate. *Nishimoto v. Vernon* 555

Hypothetical Questions:

In examination of expert witnesses, see EVIDENCE, 5.

Implication:

Creation of easement, see EASEMENTS.

Improvements:

As element of compensation for appropriation of land, see EMINENT DOMAIN, 5, 6.

On premises demised, see LANDLORD AND TENANT, 1, 2.

Public improvements, see MUNICIPAL CORPORATIONS, 2, 3.

By cotenants, see TENANCY IN COMMON, 8.

Imputed Negligence:

See NEGLIGENCE, 3.

Incompatibility:

As ground for divorce, see DIVORCE, 1.

Indemnity:

See GUARANTY.

Contracts of suretyship, see PRINCIPAL AND SURETY.

Misconduct of counsel in attempt to show indemnity insurance, see TRIAL, 2.

1. INDEMNITY (7-2) — JOINT TORT-FEASORS. A flour company maintaining a dock and dolphins for the use of vessels loading flour owes

Indemnity—Continued.

the primary duty of keeping the same and their approaches reasonably safe; but where, from the nature of a dolphin and its tendency to sway with the surging of the ship, a plank approach to it was liable to become insecure, the steamship company's failure to inspect it before ordering a stevedore to use it might be an independent act of negligence on its part, making it a joint tort-feasor with the flour company, as to an injury sustained by a stevedore in attempting to use the plank, so that there could be no recovery over from the flour company by the steamship company after paying judgment recovered for the personal injuries sustained. *Alaska Pacific Steamship Co. v. Sperry Flour Co*..... 545

2. SAME (9) — JUDGMENT (208) — CONCLUSIVENESS, AS AGAINST INDEMNITOR, OF FORMER ADJUDICATION AGAINST INDEMNITEE. In an action by a stevedore against his master and the owner of a dock, used by invitation, for injuries sustained by reason of the defective condition of a plank approach, in which the master claimed that its codefendant was alone responsible, a judgment of nonsuit as to such codefendant, voluntarily accepted by it on failure of the plaintiff to show its responsibility, followed by trial on the merits and judgment against the master, is *res judicata*, as between the codefendants, as to the four points tried out, (1) that the plank approach was insecurely fastened and unsafe, (2) that the master was liable to the servant for the injuries received, (3) that the servant had not contributed to the injury, assumed the risk, or been injured by a fellow servant, and (4) that his damages are shown by the judgment. *Alaska Pacific Steamship Co. v. Sperry Flour Co.* 545

3. INDEMNITY (9) — JUDGMENT (208)—CONCLUSIVENESS, AS AGAINST INDEMNITOR, OF FORMER ADJUDICATION AGAINST INDEMNITEE. Where a flour company and a steamship company were jointly sued for injuries sustained by a stevedore in a fall from a defective plank at the flour company's dock, a nonsuit in favor of the flour company, because of plaintiff's failure to show its control or responsibility for the plank in question, is not conclusive or *res judicata* as to the steamship company as to that fact, as between it and the flour company in the steamship company's subsequent action to recover over from the flour company on the latter's contract to furnish safe appliances while the ship was loading at the dock; since they were not adversaries in the former suit, and the steamship company had no control over plaintiff's presentation of his case (*Seattle v. Erickson*, 99 Wash. 543, overruled). *Alaska Pacific Steamship Co. v. Sperry Flour Co*..... 545

Indians:

1. INDIANS (16, 17)—CRIMINAL PROSECUTIONS—JURISDICTION OF STATE COURTS. The state courts have jurisdiction to try for larceny, committed without the limits of allotted land, a tribal Indian of the

Indians—Continued.

quarter-blood who, under the Dawes act (3 Fed. Stat. Ann. 821), was a ward of the government and an allottee of lands in an Indian reservation which had been opened and restored to the public domain, subject to the reservations and allotments; since the reservation was no longer an Indian reservation and Congress has not attempted to enact criminal statutes dealing with acts committed by Indians outside the territorial jurisdiction of the United States. *State ex rel. Best v. Superior Court*..... 238

Indictment and Information:

Effect of negative pregnant, in charging larceny by false pretenses, see CRIMINAL LAW, 5.

Alleging previous conviction in charging violation of prohibition act, see INTOXICATING LIQUORS, 2.

1. INDICTMENT AND INFORMATION (45) — INTENT — "WILLFULLY" — NECESSITY. Under Rem. Code, § 3601-27, making it a misdemeanor for any officer or agent of a savings and loan association to "willfully" violate or fail to comply with the provisions of the act, an information is insufficient to sustain a conviction unless it charges that the act complained of was "willfully" done; since the elements of *scienter* and bad purpose are involved and constitute the gravamen of the offense. *State v. Shuey*..... 437

2. INDICTMENT AND INFORMATION (60)—REQUISITES—SUFFICIENCY OF AVERMENTS IN LANGUAGE OF STATUTE. An information under Rem. Code, § 5562-23, is sufficient, where it specifies the day and place of the offense and embodies substantially the language of the statute making it a criminal offense to operate a motor vehicle in other than a careful manner or at a greater speed than is reasonable, etc. *State v. Randall*..... 695

3. INDICTMENT AND INFORMATION (74)—DUPLICITY—WAYS OR MEANS OF COMMITTING OFFENSE—LARCENY BY FALSE PRETENSES. An indictment for aiding and abetting in obtaining $130 by false pretenses is not duplicitous in that it shows that the money was obtained by forging and presenting to the county thirteen false or invalid claims for ten dollars each, the averment as to the obtaining of money being single. *State v. Callaghan*..... 486

Industrial Code Commission:

Members of as civil officers, see OFFICERS, 1.

Effect of partial invalidity of act creating, see STATUTES, 5.

Industrial Insurance:

See MASTER AND SERVANT, 5, 6.

Infants:

Custody and support on divorce of parents, see DIVORCE, 7, 8.

1. INFANTS (4) — CUSTODY OF DELINQUENTS — PROCEEDINGS. Rem. Code, § 2312, requiring the dismissal of prosecutions where the

Infants—Continued.

accused is not brought to trial within sixty days, applies only to criminal prosecutions, and not to proceedings against a delinquent child, under Rem. Code, § 1987-1, par. 6, of the juvenile act. *In re Chartrand* 560

2. SAME (4)—PROCEEDINGS—POWER OF COURT—HABEAS CORPUS. The superior court, sitting for the hearing of a writ of habeas corpus in behalf of a minor charged to be a delinquent child, has power to act as a court in juvenile matters and may treat the application as a motion for a change of custody. *In re Chartrand*..... 560

Information:

Criminal accusation, see INDICTMENT AND INFORMATION.

Inheritance Tax:

See TAXATION, 3.

Initiative and Referendum:

Acts subject to referendum, see STATUTES, 1, 3, 8.

Insolvency:

See BANKRUPTCY.
Insolvent banks, see BANKS AND BANKING.
Of corporation, see CORPORATIONS, 1.
Ground for appointment of receiver, see RECEIVERS.
Of banks, priority of state as to claims against, see STATES, 1.

Instructions:

Review as dependent on presentation of exceptions in lower court, see APPEAL AND ERROR, 7, 8.
Review of as dependent on record on appeal, see APPEAL AND ERROR, 14.
In criminal prosecutions, see CRIMINAL LAW, 6; INTOXICATING LIQUORS, 5.
In civil actions, see TRIAL.

Insurance:

Liability of insurance company for slander uttered by agent, see CORPORATIONS, 3.
Slander of employee by officers of insurance company, see LIBEL AND SLANDER, 2-6.

1. INSURANCE (10, 12)—AGENTS—RELATION—EVIDENCE. A letter in answer to an inquiry from a local insurance firm, quoting marine insurance rates on a prospective risk and expressing a hope to receive the order, does not constitute the local firm agents with power to cover the risk. *Lauridsen v. Bowden, Gazzam & Arnold* 310

2. SAME (10-12)—AGENTS—RELATIONS—POWERS. Upon an issue as to whether a local insurance firm, not agents of the insurer, was author-

Insurance—Continued.

ized, by correspondence, to protect a shipment or agree to the issuance of a policy of marine insurance, the insured, dealing with the firm at his peril, has the burden of proof, and cannot establish the agency by the evidence of the alleged agent, but must be considered to have read each of the communications as they took place. *Lauridsen v. Bowden, Gazzam & Arnold*..... 310

3. SAME (12, 13)—AGENTS—AUTHORITY. A letter offering to protect a shipment and issue a policy of marine insurance if advised of the name of the shipper, amount, cargo, boat, date, etc., written to a local insurance firm, does not authorize the firm to receive the premium and protect the shipment by an agreement for a policy. *Lauridsen v. Bowden, Gazzam & Arnold*..... 310

4. SAME (30)—POLICY—EXECUTORY AGREEMENT—MARINE INSURANCE. A letter from insurance agents to a local insurance firm, offering to protect a prospective shipment and issue a policy of marine insurance, if advised of the name of shipper, amount, cargo, boat, date, etc., does not constitute a contract for insurance, although the local firm receipted for the premiums, where the shipment was lost before the data called for was received by the insurance company's agents. *Lauridsen v. Bowden, Gazzam & Arnold*..... 310

5. INSURANCE (34) — LIFE POLICY — VALIDITY — DELIVERY WHILE IN GOOD HEALTH. Where insured died nine days after delivery of a policy, which from the undisputed testimony of experts was from a disease (tumor of the brain) which had existed for months and from which he was ailing at the time of delivery, it conclusively appears that the policy was not delivered to the insured in his lifetime in good health, as required by the policy in order that it take effect. *Logan v. New York Life Insurance Co*..... 253

6. SAME (34) — DELIVERY WHILE IN GOOD HEALTH — WARRANTIES. A policy providing it shall not take effect unless delivered to the insured in his lifetime in good health is not governed by Rem. Code, §§ 6059-34 and 6059-184, relating to the effect of oral or written misrepresentations or warranties or statements made in the negotiations or by the insured; since the condition is not a warranty or statement within these statutes. *Logan v. New York Life Insurance Co.* 253

7. SAME (34, 176) — DELIVERY WHILE IN GOOD HEALTH — BURDEN OF PROOF. When the policy has been delivered and the first premium paid, the burden of proof is upon the insurance company to show that the policy was delivered while the insured was not in good health, and for that reason did not become effective. *Logan v. New York Life Insurance Co*..... 253

8. SAME (120)—RISKS—VALUE OF PROPERTY. Where buildings are totally destroyed by fire, any recovery must be for the amount

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stated in the policy, under Rem. Code, § 6059-105½, providing that the same shall be conclusive as to the value. *Pierce v. Globe & Rutgers Fire Ins. Co.* 501

9. INSURANCE (132, 188)—PROOFS OF LOSS—QUESTIONS FOR JURY. The failure of the insured, without reasonable cause, to appear for examination under oath, as required by a fire insurance policy, is a question for the jury, where it appears that, before the time appointed, he was arrested for arson at the instance of a representative of the company and committed to jail and was unable to obtain his release on bail until two or three days after the day set, and no further demand and no attempt was made to examine him while in jail. *Pierce v. Globe & Rutgers Fire Ins. Co.* 501

10. SAME (132)—STATEMENTS OF LOSS—PLACE FOR EXAMINATION. The proper place for an examination of the insured is where the loss occurred, and the company has no right to demand that it take place elsewhere. *Pierce v. Globe & Rutgers Fire Ins. Co.* 501

11. SAME (189)—VALUE OF PROPERTY DESTROYED—INSTRUCTIONS. An instruction relating to the amount of the recovery for buildings totally destroyed to the effect that the jury shall not consider the evidence at all as to the value of the building, unless the buildings were destroyed because of criminal fault of the insured, is not misleading, where other instructions fully advised the jury that false swearing even as to the value of the buildings would defeat recovery under the policy. *Pierce v. Globe & Rutgers Fire Ins. Co.* 501

12. INSURANCE (205)—MUTUAL BENEFIT INSURANCE—REINSTATEMENT—WAIVER OF OBJECTIONS. The fact that the holder of a beneficiary certificate had, while in good health, been reinstated for past lapses in payment of dues does not waive a default in payment as to which he could not be reinstated "under and by virtue of the by-laws" because he was not in good health, as required, at the time he attempted to be reinstated. *Berry v. National Council of Knights & Ladies of Security* 531

13. SAME (205). A beneficiary association does not ratify the act of a local secretary in reinstating a delinquent member and remitting the payments, where the society had no notice at the time of the payment that the beneficiary was not in good health at the time of the attempted reinstatement, and the payment was returned by the home office within a reasonable time. *Berry v. National Council of Knights & Ladies of Security* 531

Intent:

Evidence of other offenses, to show criminal intent, see CRIMINAL LAW, 2.

Necessity and sufficiency of allegations as to intent, see INDICTMENT AND INFORMATION, 1.

Of legislature as element in construction of statutes, see STATUTES, 7.

Interest:

See USURY.

Allowances of on balance due in hands of administrator, see EXECUTORS AND ADMINISTRATORS, 1.

Levy of assessment to meet interest payments on bonds of waterway district, see NAVIGABLE WATERS.

1. INTEREST (3)—COMPENSATION FOR USE. Where the amounts and dates of maturity of installments on a sale of treasury stock were fixed and certain, they draw interest at the rate of six per cent per annum upon maturity, under Rem. Code, § 6250. *Benner v. Billings* 1

Interlocutory Orders:

Review of on appeal, see APPEAL AND ERROR, 21.

Intoxicating Liquors:

Prosecutions for violation of prohibition act, see CRIMINAL LAW, 4, 6, 7.

Ratification of prohibition amendment to Federal constitution, see STATUTES, 1-4.

1. INTOXICATING LIQUORS (26)—REGULATION — PHYSICIANS — UNLAWFUL PRESCRIPTIONS—STATUTES—VALIDITY. Rem. Code, § 6262-8, providing that it shall be unlawful for a physician, after he has been twice convicted of violating the prohibition law, to thereafter write any prescription for intoxicating liquor, is a valid exercise of legislative power. *State v. Emonds*..... 688

2. INTOXICATING LIQUORS (42) — INFORMATION — PREVIOUS CONVICTION OF DEFENDANT—STATUTES. The initiative prohibition act, Rem. Code, § 6262-32, authorizing increased punishments on subsequent convictions and requiring prosecuting attorneys to allege a previous conviction in the information, is a proper police regulation to discourage violations of the law, and not open to the objection that it deprives the accused of a fair trial. *State v. Dericho*..... 468

3. INTOXICATING LIQUORS (48, 50) — UNLAWFUL POSSESSION — EVIDENCE—SUFFICIENCY. Under Rem. Code, § 6262-23, making possession of more than two quarts of intoxicating liquors prima facie evidence that it was kept for unlawful sale or disposition, proof of the possession of twenty-three quarts of whiskey raises a question for the jury, notwithstanding defendant testified to its lawful acquisition and that it was kept for his personal use. *State v. Conner*.... 571

4. INTOXICATING LIQUORS (49) — UNLAWFUL PRESCRIPTIONS — EVIDENCE—ADMISSIBILITY. In a prosecution for prescribing intoxicating liquor after being twice convicted of violating the prohibition law, it is not error to permit proof of more than two convictions. *State v. Emonds* 688

Intoxicating Liquors—Continued.

5. SAME (51)—OFFENSES—INSTRUCTIONS. In a prosecution for illegal possession of intoxicating liquors, an instruction that there could be no conviction if the accused had an illegal quantity in his possession which he intended to be drunk by himself and guests at his private apartments is favorable to the accused. *State v. Conner* 571

Irrigation:

See WATERS AND WATER COURSES.

Condemnation for irrigation reservoir, see EMINENT DOMAIN, 5, 6.

Issues:

In civil action, see PLEADING, 2.

Joint Tenancy:

See TENANCY IN COMMON.

Joint Tort Feasors:

See INDEMNITY, 1.

Judgment:

Review in general, see APPEAL AND ERROR.

Review of appealable orders, see APPEAL AND ERROR, 1-4.

Filing of as commencement of period of time for taking appeal, see APPEAL AND ERROR, 10.

Former decision as law of the case on subsequent appeal, see APPEAL AND ERROR, 26.

In action by trustee to recover property of bankrupt, see BANKRUPTCY, 2.

Conclusiveness of former conviction under prohibition act, see CRIMINAL LAW, 4.

In action for divorce, see DIVORCE, 3, 7, 8.

Vacation of order approving final account, see EXECUTORS AND ADMINISTRATORS, 10.

Necessity for money judgment to sustain writ, see GARNISHMENT, 3.

Conclusiveness on indemnitor of judgment against person indemnified, see INDEMNITY, 2, 3.

1. JUDGMENT (38, 137-1)—SETTING ASIDE—INVALID SERVICE. A judgment of default upon publication of summons and attaching land as the property of a nonresident is properly set aside for fraud, where it appears that plaintiff commenced suit by mailing summons to defendant's former address, after being informed that she had left there and was probably on the land, without any attempt to make personal service, when any diligence would have disclosed that she was residing on the land from the commencement of the action until entry of judgment, and she had a valid defense and no notice of the suit. *Rowe v. Silbaugh* 518

Judgment—Continued.

2. JUDGMENT (222)—CONCLUSIVENESS—MATTERS LITIGATED AND DETERMINED. The liability of a tenant in common to share in the payment of a mortgage litigated and determined in a partition suit is concluded and cannot be again raised in an action for an accounting between the same parties. *Womach v. Sundygren*..... 80

3. JUDGMENT (227, 229) — CONCLUSIVENESS — MATTERS NOT IN ISSUE. Where, in a former action, the court denied relief on account of rents received prior to 1916 because not involved therein, the former judgment is not a bar to an action for rents for the year 1915. *Womach v. Sandygren*..... 80

Judicial Notice:

In civil action, see EVIDENCE, 1, 2.

Judicial Sales:

Of land for nonpayment of taxes, see TAXATION, 1, 2.

Jurisdiction:

Of state courts over offenses by Indians, see INDIANS.
In action to foreclose maritime lien, see MARITIME LIENS.

Jury:

Verdict in criminal prosecutions, see CRIMINAL LAW, 3.
Instructions in criminal prosecutions, see CRIMINAL LAW, 6.
Taking case or question from jury at trial, see TRIAL, 3.

Knowledge:

Servant's knowledge of defect or danger as element of assumption of risk by servant, see MASTER AND SERVANT, 3.
Of dangers as element of contributory negligence, see MASTER AND SERVANT, 4.

Landlord and Tenant:

Denial of right of forfeiture of mining lease for default in payment of royalties, see EQUITY.
Lease of coal mine, see MINES AND MINERALS, 3, 4.
Surrender of lease as discharge of surety on bond of lessee, see PRINCIPAL AND SURETY.

1. LANDLORD AND TENANT (63) — IMPROVEMENTS — COST. Where rental for a building was to be based on its cost, architect's services (although his plans and specifications were deviated from by mutual agreement) and the salary of an adult son who kept books and assisted in overseeing the work, are properly chargeable as a part of the costs of the building. *Hood Manufacturing Co. v. Matzger*..347

2. SAME (63). In such a case, the cost of the building is not shown to be less than $6,500, from the fact that a contractor bid $5,300 on the main part of the building, where additional items brought the cost up to $7,000. *Hood Manufacturing Co. v. Matzger*..... 347

Landlord and Tenant—Continued.

3. LANDLORD AND TENANT (87, 88) — EVICTION — ACTS BY LANDLORD. Where a sublease provided that the lessor should cut back a portion of the adjoining and of the leased premises for a joint entrance, a change in and obstruction of such entrance in violation of the sublease and notice that the sublease was terminated and would be recognized only as a tenancy from month to month, constitutes an eviction, entitling the sublessee to move out and to damages. *Brewster Cigar Co. v. Atwood*..... 639

4. SAME (91)—EVICTION—DEFENSES. In an action against a lessee and its sureties for damages for evicting its sublessee, it is no defense that the sublessee violated the law in allowing dice shaking, where no objection was made thereto and it was not evicted for that reason, but because the dominant tenant changed the building in violation of the terms of the sublease and desired the sublessee's removal. *Brewster Cigar Co. v. Atwood*..... 639

5. LANDLORD AND TENANT (127)—UNLAWFUL DETAINER—EXISTENCE OF RELATION. Plaintiff was entitled to prosecute an action of unlawful detainer where on denial of the relation of landlord and tenant, the court found, on conflicting evidence, that defendant was in possession as plaintiff's tenant. *Davis v. Pendrass*..... 279

6. LANDLORD AND TENANT (128, 137)—UNLAWFUL DETAINER—TIME TO SUE. A tenant's action of unlawful detainer against a sublessee is not prematurely commenced, at the end of the term because of plaintiff's agreement for an extension of the sublease, in case his own lease was extended pursuant to an oral agreement, where it appears that he was unable to secure an extension of his lease and so promptly notified the sublessee. *Greene v. Garrison*..... 430

Larceny:

By false pretenses, see CRIMINAL LAW, 1, 2, 5.
Jurisdiction of offense by Indians, see INDIANS.
Duplicity in charging, see INDICTMENT AND INFORMATION, 3.

Lateral Support:

Damages for removal of, see MUNICIPAL CORPORATIONS, 2, 3.

Law of the Case:

Decision on appeal, see APPEAL AND ERROR, 26.

Leases:

See LANDLORD AND TENANT.

Legacy:

Taxation of legacies, see TAXATION, 3.

Legislative Construction:

As aid to statutory construction, see STATUTES, 7.

Legislature:

Ratification of proposed amendment to Federal constitution, see STATUTES, 1-3.

Letters:

Of corporation to branch office as publication of libel, see LIBEL AND SLANDER, 1.

Levy:

Of assessment for benefits from commercial waterway, see NAVIGABLE WATERS.

Libel and Slander:

Liability of corporation for slander uttered by agent, see CORPORATIONS, 3.

1. LIBEL AND SLANDER — PUBLICATION — ACTS — LETTER TO BRANCH OFFICE. Publication of a libel is the communication of defamatory matter to some third person, and there is no publication by a libelous letter written at the main office of a corporation and sent to its own branch office where it was read only by its own officers and agents. *Prins v. Holland-North America Mortgage Co.* 206

2. LIBEL AND SLANDER (16, 35)—EXCEEDING PRIVILEGE—EVIDENCE—SUFFICIENCY. Charges by an insurance auditor and cashier that a cash clerk of an insurance company had stolen money, made at an interview with the clerk at which the father was present, are only qualifiedly privileged, and whether the statement was *bona fide* or malicious is a question for the jury, notwithstanding the defendant's officers testified positively that there was no malice and that they spoke and acted in good faith for the welfare of the company, where the charge was not confined to the admitted fact that the clerk was short a small sum in his accounts, it appeared that others in the office might have stolen the money from his cash drawer, a close cross-examination of plaintiff did not detract from his straightforward and convincing evidence, and thereafter other like slanderous statements were made to other parties. *Ecuyer v. New York Life Insurance Co.* 411

3. SAME (36)—DAMAGES—MEASURE. In an action for slander, in charges by a life insurance company that its cash clerk had stolen money, made to his father, in excess of privilege and repeated to others, the repetition and republication may be considered as to the question of malice and in aggravation of compensatory damages. *Ecuyer v. New York Life Insurance Co.* 411

4. SAME (37) — DAMAGES — MENTAL SUFFERING. In an action for slander, in charges by a life insurance company that its cash clerk had stolen money, the words being actionable *per se* without reference to plaintiff's business or professional character, he is entitled to recover for mental suffering. *Ecuyer v. New York Life Insurance Co.* 411

Libel and Slander—Continued.

5. SAME (38)—DAMAGES—AMOUNT. A verdict for $6,000 reduced by the trial court to $3,000 for slander by an insurance company in charging its cash clerk with stealing, is not excessive. *Ecuyer v. New York Life Insurance Co.*..... 411

6. LIBEL AND SLANDER (53)—INSTRUCTIONS. In an action for slander, in which there was evidence that the defendant's officers had exceeded their privilege in charging a cash clerk with stealing, no just complaint can be made of submitting the question of exceeding the privilege, requiring the plaintiff to show malice, and if the privilege was exceeded and malice shown, authorizing the jury to fix the damages, but allowing no special damages for loss of employment in the absence of any evidence thereof. *Ecuyer v. New York Life Insurance Co.*..... 411

Liens:

Maritime liens, see MARITIME LIENS.

Life Insurance:

See INSURANCE, 5-7, 12-13.

Liability of company for slander uttered by agent, see CORPORATIONS, 3.

Lights:

Guarding obstruction in highway, see HIGHWAYS.

Limitation of Actions:

Time for taking appeal, see APPEAL AND ERROR, 10-12.

Time for presentation of claims against decedent's estate, see EXECUTORS AND ADMINISTRATORS, 6-9.

Lis Pendens:

Pendency of other action ground for abatement, see ABATEMENT AND REVIVAL, 1.

Malice:

Element of libel, see LIBEL AND SLANDER, 2, 3.

Malicious Prosecution:

1. MALICIOUS PROSECUTION (3, 17-1)—PROBABLE CAUSE—ADVICE OF ATTORNEY—QUESTION FOR JURY. In an action for malicious prosecution, whether defendant made a full and fair statement of facts to the prosecuting attorney, is a question for the jury, where it appears that his criminal prosecution of plaintiff for larceny rested largely upon automobile tracks leading between their homes, alleged to have been made at 2 a. m.; and, according to plaintiff's testimony, when charged with the theft he offered to show defendant that such tracks must have been made before 11:30 p. m., since they were crossed by a motorcycle at that time; the defendant not having disclosed such fact to the prosecutor. *Lester v. Millman*..... 300

Marine Insurance:

See INSURANCE, 1-4.

Maritime Liens:

1. MARITIME LIENS (12-16)—ENFORCEMENT—SUBSTITUTION OF BOND. The court, in virtue of its inherent equity power, has jurisdiction, in a pending action to foreclose liens for the construction of a ship, to release the property and substitute therefor a deposit of money or a bond; the statute, Rem. Code, § 1182, simply providing that the liens may be foreclosed in a civil action, and being silent as to the matter of substitution of security. *State ex rel. Eureka Cedar Lumber & Shingle Co. v. Superior Court*..... 620

Market Value:

As basis for compensation, see EMINENT DOMAIN, 7, 8.

Marriage:

Community or separate status of property acquired by man and woman living together but not married, see HUSBAND AND WIFE, 1.

Married Women:

See HUSBAND AND WIFE.

Master and Servant:

Existence of relation, see BAILMENT.

Right of recovery over from codefendant for judgment recovered for injuries to servant, see INDEMNITY.

Contributory negligence of servant imputed to master, see NEGLIGENCE, 3.

Construction of verdict in action for injuries to servant, see TRIAL, 4.

1. MASTER AND SERVANT (76, 77)—FELLOW SERVANTS—SIGNALS. The giving of signals of the movement of a train is not, as a matter of law, a mere detail of the work that can be delegated to a fellow servant, where there was evidence that it was necessary for the protection of a crew loading timbers on the train as it was moved from pile to pile. *Lange v. Spokane & Inland Empire R. Co.*... 109

2. MASTER AND SERVANT (92, 170)—ASSUMPTION OF RISKS—QUESTION FOR JURY—SIGNALS. The assumption of risks by one employed in loading timbers on cars, injured through a sudden movement of the train without warning, is a question for the jury, where there was evidence of two witnesses who had worked only that day that it was customary to give signals by blasts of the whistle when the train was about to be moved. *Lange v. Spokane & Inland Empire R. Co.* 109

3. MASTER AND SERVANT (102, 161) — RISKS ASSUMED — COMPLIANCE WITH COMMANDS. Whether a farm hand, employed to milk and care

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for cows, assumed the risks in removing a halter from a cow known by him to be vicious, is a question for the jury, where there was evidence that he did so under protest in the presence and at the command of the employer; the question being whether he acted as a reasonably prudent person. *Walters v. Sievers*..... 221

4. MASTER AND SERVANT (110-112) — CONTRIBUTORY NEGLIGENCE — KNOWN DANGERS. An experienced farm hand, familiar with the conditions, cannot recover for injuries sustained where, after due consideration, he attempted to drive a horse and wagon under an elevated pipe, mistakenly judging that there would be sufficient clearance when, as he approached it, he could have protected himself by ordinary care and observation. *Simpson v. Brown*..... 366

5. MASTER AND SERVANT (121-2)—WORKMEN'S COMPENSATION ACT—ADOPTION OF FIXED SCHEDULE—CAPRICIOUSNESS—REVIEW. Under Rem. Code, § 6604-20, allowing an appeal from an award of damages by the industrial insurance commission upon questions of fact, the action of the commission is not capricious or arbitrary in that an award for $150 for the loss of part of a finger was determined by a system of "degree" classifications made by the commission under Laws 1917, p. 81, § 1, subdiv. f., which names fixed sums from $2,000 to $1,300, for the loss of various major parts of a leg or arm, and requires that compensation for other permanent partial disability shall be in the proportion which the extent of the disability shall bear to the disabilities specified in the act most closely approximating such other disability in degree of disability. *Foster v. Industrial Insurance Commission*..... 400

6. SAME (121-2)—AWARD BY SINGLE MEMBER OF COMMISSION. An award of $150 for the loss of part of a finger, according to the schedule fixed, is not capricious or arbitrary in that it was made by only one of the commissioners, where the schedule was adopted by the commission as a whole, by its "degree" classifications under Laws 1917, p. 81, § 1, subdiv. f., which contemplates that individual awards be made in the exact sum provided by a definite and uniform schedule. *Foster v. Industrial Insurance Commission*..... 400

7. MASTER AND SERVANT (172, 182)—NEGLIGENCE OF SERVANT—SCOPE OF EMPLOYMENT—EVIDENCE. The defendant's admission of ownership of an automobile causing damages, and that the one driving it was in his employ, establishes a *prima facie* case against the owner upon the question of the driver's acting in the course of his employment. *Singer v. Metz Co*..... 562

8. MASTER AND SERVANT (172, 182)—EVIDENCE (34)—INJURY TO THIRD PERSON—SCOPE OF EMPLOYMENT—SHIFTING BURDEN OF PROOF. In an action for personal injuries sustained through the negligent driving of an automobile, defendant's admission of ownership and that the driver was in his employ at the time of the collision, does not shift

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the burden of proof, which is still upon the plaintiff to establish that the driver was acting in the course of his employment at the time of the collision. *Singer v. Metz Co*..... 562

9. MASTER AND SERVANT (172-174-1) — INJURY TO THIRD PERSONS — SCOPE OF EMPLOYMENT. A special watchman, employed to protect the property of patrons of an agency and night patrol system, acted outside of the scope of his employment, as a matter of law, when he left his beat and the property of his employers and entered upon a chase not connected with his work, to aid a regular police officer of the city, and shot and killed the person whom he was attempting to apprehend; and his employers, being in no way concerned in the affair, would not be liable for his act. *Frisell v. Surry* 662

Material Facts:

Certificate to statement of facts, see APPEAL AND ERROR, 15.

Materiality:

Of interlineation in deed, see ALTERATION OF INSTRUMENTS, 2.

Materials:

Delivery to contractor on public work, see STATES, 4.

Maturity:

Foreclosure of mortgage before maturity, see CHATTEL MORTGAGES, 4, 5.

Measure of Damages:

For slander or libel, see LIBEL AND SLANDER, 3.
For delay in performance of contract, see SALES, 3.

Mechanics' Liens:

Liens for construction of vessels, see MARITIME LIENS.
Filing of as breach of mining lease, see MINES AND MINERALS, 4.
Action by materialman on contractor's bond, see STATES, 2-4.

Mental Suffering:

As element of damages for slander, see LIBEL AND SLANDER, 4.

Mines and Minerals:

Denial of right of forfeiture of mining lease for default in payment of royalties, see EQUITY.

1. MINES AND MINERALS (16-21) — CONVEYANCES AND CONTRACTS — AGREEMENT TO SECURE ADVANCES—CONSTRUCTION. An agreement by parties making advances to complete the purchase of mining property, by which they promise to pay, on or before a certain date, a certain obligation of the company upon the following terms and conditions, viz: by paying a *pro rata* share of royalties received by them

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in the operation of the mine, up to the date mentioned, and if it is not then paid, the remainder to be assumed by the mining company, is not a binding contract to pay the account in full, but only to pay the *pro rata* share of the royalties received. *Kienbaum v. Rathfon Reduction Works* 115

2. SAME (16-21). Where a deed to mining property was given to secure advances made by plaintiffs, who promised to pay a *pro rata* share of royalties received by them in the operation of the mine to be applied on a certain trustee account (one of the obligations of the company), the promise to pay the royalties is not satisfied by crediting the amount on the obligations of the company to the plaintiffs; but payment of the same for the benefit of the parties holding the trust account is a condition precedent to plaintiffs' action to foreclose the deed as a mortgage securing the advances. *Kienbaum v. Rathfon Reduction Works*..... 115

3. MINES AND MINERALS (17) — COAL LANDS — LEASE—FORFEITURE—WAIVER. A coal mine lease, calling for payment of royalties on all coal mined and giving the lessor the right of oversight and inspection of operations, cannot be forfeited for waste in using coal for ballast, if the lessor permitted the lessee to mine coal for ballast and exclude the same from the royalty account; at least, not until specific demand had been refused. *Harlan v. McGraw*..... 286

4. SAME (17)—COAL LANDS—LEASE—BREACH. Where a coal mine lease pledged the property as security for the payment of rental, the filing of labor liens against the property is not such a breach as would warrant forfeiture of the lease, especially where the liens have been fully paid. *Harlan v. McGraw*..... 286

Minors:

Proceedings against delinquent child, see INFANTS.

Misconduct:

Of attorney, ground for disbarment, see ATTORNEY AND CLIENT.
Of counsel, see TRIAL, 2.

Misnomer:

Of appellant in brief, see APPEAL AND ERROR, 20.

Mistake:

Ground for reformation of instrument, see REFORMATION OF INSTRUMENTS.

Modification:

Of decree awarding custody of child, see DIVORCE, 7, 8.
Of order approving final account, see EXECUTORS AND ADMINISTRATORS, 10.

Money:

Deposit of cash in lieu of bail, see BAIL.
Money accepted in lieu of bail as subject to garnishment, see GARNISHMENT, 1.
Tender and keeping tender good, see TENDER.

Mortgages:

Of property of insolvent debtor, see BANKRUPTCY.
Of personal property, see CHATTEL MORTGAGES.
Deeds as mortgage to secure advances, see MINES AND MINERALS, 2.
Enforcement of agreement by mortgagor to purchase certificate of sale on foreclosure of second mortgage, see SPECIFIC PERFORMANCE, 1, 3.

1. MORTGAGES (243) — FORECLOSURE — ATTORNEY'S FEES—REASONABLE AMOUNT. In a suit for the foreclosure of a deed to secure advances which did not provide for attorney's fees for its foreclosure, only the statutory costs as attorney's fees can be allowed. *Kienbaum v. Rathfon Reduction Works* 115

Motions:

For extension of time for filing statement of facts, see APPEAL AND ERROR, 18.
For new trial, waiver of error, see APPEAL AND ERROR, 22.
To dismiss, recall of remittitur to hear, see APPEAL AND ERROR, 27.

Motor Vehicles:

Charging criminal offense in mode of operation, see INDICTMENT AND INFORMATION, 2.

Municipal Corporations:

Right of county to condemn city property for road, see EMINENT DOMAIN, 2, 3.
Proceedings at public service hearing to fix gas rates, see GAS.

1. MUNICIPAL CORPORATIONS (71)—OFFICERS (43)—SALARY—INCREASE DURING TERM—STATUTES. Const., art. 11, § 8, providing that the salary of any county or municipal officer shall not be increased or diminished after his election or during his term of office, prohibits the granting of compensation to a port commissioner, by vote of the district pursuant to Laws 1917, p. 502, § 2, although he was elected and inducted into office subsequent to the passage of that act, where he took office prior to the district vote authorizing the salary; since the constitutional prohibition operates against the district as well as against the state. *State ex rel. Seattle v. Wardall* 606

2. MUNICIPAL CORPORATIONS (190, 194)—DAMAGES—REMOVAL OF LATERAL SUPPORT—DEFENSES. It is no defense to an action against a city for damages to abutting property through a regrade of a street,

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removing plaintiff's lateral support, that plaintiff petitioned for the improvement, and evidence thereof would have been error tending to confuse the jury on the subject of the damages. *Blomskog, Erickson & Cotton v. Seattle*..... 471

3. SAME (190, 197) — DAMAGES — REMOVAL OF LATERAL SUPPORT — EVIDENCE—ADMISSIBILITY. In an action against a city for damages to abutting property through the regrade of a street removing plaintiff's lateral support, it is inadmissible for the city to show its intention and future plans for taking care of the situation or to allow expert real estate witnesses to answer questions based thereon. *Blomskog, Erickson & Cotton v. Seattle*..... 471

4. SAME (379, 389). In such a case, the emergency does not excuse his negligence in operating his automobile with the brakes out of order, when otherwise he could have stopped in time to have avoided the accident, since he was bound to anticipate the necessity of emergency stops and keep his brakes in order. *Allen v. Schultz*.. 393

5. SAME (379, 392) — COLLISION AT CROSSING — MUTUAL RIGHTS AND DUTIES—INSTRUCTIONS. Upon an issue of fact as to whether an automobile accident took place at a city crossing, giving the pedestrian the right of way, or at the street intersection, it is better, instead of one instruction, to instruct separately as to the reciprocal rights and duties of pedestrians and vehicles at crossings and intersections, and as to the greater hazard in the one case. *Schwalen v. Fuller & Co.*..... 476

6. MUNICIPAL CORPORATIONS (380, 389)—STREETS—AUTOMOBILES—VIOLATION OF ORDINANCE—EVIDENCE. The driver of an automobile, driving on the wrong side of the street contrary to law, who struck a passenger alighting from a street car, cannot claim an emergency excusing his act, where it appears that the accident was due to his own negligence in approaching the street intersection under the erroneous assumption that the street car was not going to stop at its regular stopping place. *Allen v. Schultz*..... 393

7. MUNICIPAL CORPORATIONS (380, 390)—USE OF STREETS—VIOLATION OF ORDINANCE—"OBSTRUCTIONS." The operation of an automobile with the windshield so covered with rainwater that the driver could not see where he was going is not negligence, as a matter of law, as in violation of a city ordinance forbidding the operation of an automobile so constructed that the driver did not have a clear and unobstructed view; since rainwater is not an obstruction within the meaning of such ordinance. *Schwalen v. Fuller & Co*..... 476

8. MUNICIPAL CORPORATIONS (384, 392)—NEGLIGENCE (15)—PROXIMATE AND CONCURRING CAUSE—INSTRUCTIONS. Where the drivers of two colliding automobiles, and a storekeeper who had obstructed the view by piling boxes at the street intersection, are all three charged with concurring negligent acts, each charged to be the proximate

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cause of an injury to a bystander, and the evidence that the obstruction contributed to the injury is not satisfactory, it is error to refuse a requested instruction to the effect that the obstruction would not be a proximate cause if the injury would have resulted without the concurrence of the obstruction; under the rule that an act to be the proximate cause of an injury must be a cause "but for which" the injury would not have been suffered. *Ross v. Smith & Bloxom* 493

9. MUNICIPAL CORPORATIONS (390)—AUTOMOBILE COLLISION—CAUSE OF ACCIDENT—QUESTION FOR JURY. Whether the negligence of the defendant in maintaining an unlawful obstruction on the street was a contributing cause to the injury of a bystander, when two automobiles collided at a street intersection, is a question for the jury, where one of the drivers in collision testified that boxes piled by the defendant at the curb obstructed his view. *Ross v. Smith & Bloxom* 493

Mutual Benefit Insurance:

See INSURANCE, 12, 13.

Names:

Misnomer of party in brief, see APPEAL AND ERROR, 20.
Defect of parties plaintiff, see PARTIES.
Filing certificate of assumed name, see PARTNERSHIP, 2.

Navigable Waters:

Bodies and streams of waters not capable of navigation, see WATERS AND WATER COURSES.

1. NAVIGABLE WATERS (2-1)—WATERWAY DISTRICTS—ASSESSMENTS—MAXIMUM BENEFITS—INTEREST—BONDS. Rem. Code, § 8192a, authorizing an assessment of land benefited for the entire cost of a commercial waterway, not exceeding the maximum amount of benefits to be received, the levy not to be over twenty-five per cent of the cost in any one year, does not authorize a levy to meet interest payments on bonds to be issued in addition to the maximum benefits found, in view of the fact that there is no provision for the payment of interest, and in view of Id., § 8199a, appropriating and pledging "payment" of the bonds out of the maximum benefits stated and declared (Held obiter, on rehearing En Banc). *Behrens v. Commercial Waterway District No. 1*..... 155

Necessity:

Way of necessity, see EASEMENTS; EMINENT DOMAIN, 1.
Of presenting claims against estate of decedent, see EXECUTORS AND ADMINISTRATORS, 6-9.
Of alleging intent, see INDICTMENT AND INFORMATION, 1.

Negative Pregnant:

In information charging larceny by false pretenses, see CRIMINAL LAW, 5.

Negligence:

Of bailee, see BAILMENT.
Right of action for wrongful death, see DEATH.
Defects or obstructions in highway, see HIGHWAYS.
Of employers, see MASTER AND SERVANT.
Risks assumed by servant, see MASTER AND SERVANT, 2, 3.
Cause of injury to persons in city street, see MUNICIPAL CORPORATIONS, 4-9.
In operation of trains, see RAILROADS.
Injuries by flooding land, see WATERS AND WATER COURSES, 2-5.

1. NEGLIGENCE (6)—USE OF PREMISES—INVITATION. A flour company maintaining docks and approaches for the use of ships loading flour owes the positive duty to keep its premises safe for the use of servants of others expected to use it. *Alaska Pacific Steamship Co. v. Sperry Flour Co*..... 545

2. NEGLIGENCE (14, 15)—PROXIMATE CAUSE. An act to be the proximate cause of the injury must be a cause but for which the injury would not have been suffered. *Ross v. Smith & Bloxom*..... 493

3. NEGLIGENCE (22-1—24) — IMPUTED NEGLIGENCE — SERVANTS—SCOPE OF EMPLOYMENT. In an action for injuries sustained at a railroad crossing through the concurrent negligence of the company and the driver of the car, it cannot be said, as a matter of law, that the driver, who was employed as a farm hand, was not acting in the course of his employment so that his contributory negligence would be imputable to his employer, where it appears that, although it was Sunday and he was taking a young lady for a ride, he stopped at the express office to procure an express package addressed to his employer, as he had done on other occasions without express direction to do so. *Lloyd v. Northern Pac. R. Co*..... 57

Negotiable Instruments:

See BILLS AND NOTES.

Newly Discovered Evidence:

Ground for new trial, see NEW TRIAL.

New Trial:

Appealability of order granting, see APPEAL AND ERROR, 2.
Appeal from order granting, see APPEAL AND ERROR, 11-12.
Waiver of motion for, effect, see APPEAL AND ERROR, 22.
Decision on appeal as law of the case on new trial, see APPEAL AND ERROR, 26.

New Trial—Continued.

1. NEW TRIAL (34)—GROUNDS—NEWLY DISCOVERED EVIDENCE. Where plaintiff's evidence was self-contradictory, and there was serious room for doubt, a new trial should be granted, upon disclosing supporting evidence which could not, with reasonable diligence, have been discovered before the trial. *Coldeen v. Reid*..... 508

Next of Kin:

Right of action for wrongful death, see DEATH.

Notaries:

Necessity for notarial seal upon certificate to affidavit of good faith, see CHATTEL MORTGAGES, 1.

Notes:

Promissory notes, see BILLS AND NOTES.

Notice:

Review of sufficiency of notice of claim against county as dependent on objections in lower court, see APPEAL AND ERROR, 5.
Of hearing to change custody of child, see DIVORCE, 8.
Of hearing by public service commission on application to fix gas rates, see GAS, 1.
Defects or danger as element of assumption of risk by servant, see MASTER AND SERVANT, 3.
Application for appointment of receiver, see RECEIVERS.
School election, see SCHOOLS AND SCHOOL DISTRICTS, 2.
Sale for taxes, see TAXATION, 1.

Objections:

Review as dependent on objection made in lower court, see APPEAL AND ERROR, 5.
To pleadings and waiver thereof, see PLEADING, 4.

Obstructions:

Of highways, see HIGHWAYS.
Of water courses, see WATERS AND WATER COURSES, 2-5.

Offer:

To purchase or sell personalty, see SALES, 1, 2.
To purchase or sell land, see VENDOR AND PURCHASER.

Officers:

Authority of in attempt to make arrest for misdemeanor, see ARREST.
Purchase of stock of failing corporation, see CORPORATIONS, 1.
Advice of officer as affecting liability for malicious prosecution, see MALICIOUS PROSECUTION.
Increase of salary during term, see MUNICIPAL CORPORATIONS, 1.

Officers—Continued.

Powers of school district board to employ special counsel, see SCHOOLS AND SCHOOL DISTRICTS, 1.

Sheriffs or constables, see SHERIFFS AND CONSTABLES.

Purchase of certificates of delinquency by county treasurer, see TAXATION, 2.

1. OFFICERS (2)—WHO ARE OFFICERS. A member of the industrial code commission created by Laws 1919, p. 566, holds a civil office, within Const., art. 2, § 13, prohibiting the appointment or election of any member of the legislature, during the time for which he is elected, to any civil office created during his term; the commission having power to make investigations, hold hearings, and make reports to the legislature as to the evils existing in industrial life, each member receiving compensation for each day's services in addition to expenses. *State ex rel. French v. Clausen*..... 667

2. OFFICERS (43) — SALARY — INCREASE DURING TERM — STATUTES. Const., art. 2, § 25, and art. 11, § 8, providing that the legislature shall never grant any extra compensation to any public officer, and that the salary of any public officer shall not be increased or diminished after his election or during his term of office, applies to public officers elected for a fixed term to serve without compensation, and accordingly prohibits the granting of substantial compensation thereto after their election, and renders Laws 1917, p. 502, § 2, providing for compensation to port commissioners serving without compensation inapplicable as to commissioners theretofore elected. *State ex rel. Seattle v. Wardall*..... 606

Opening:

Judgment, see JUDGMENT, 1.

Opinion Evidence:

In civil actions, see EVIDENCE, 5.

Oral Contracts:

See FRAUDS, STATUTE OF.

Orders:

Review of appealable orders, see APPEAL AND ERROR, 1-4.

Appeal from order granting new trial, time for, see APPEAL AND ERROR, 11, 12.

Review on appeal, see APPEAL AND ERROR, 21.

Approving final account of administrator, see EXECUTORS AND ADMINISTRATORS, 10.

Ordinances:

Violation of ordinance by driver of auto, see MUNICIPAL CORPORATIONS, 4, 6, 7.

Owners:

Notice to record owner of tax sale, see TAXATION, 1.

Parent and Child:

Custody and support of children on divorce, see DIVORCE, 7, 8.

Pari Materia:

Construction of statutes, see STATUTES, 9.

Partial Invalidity:

Effect of partial invalidity of statutes, see STATUTES, 5.

Parties:

Death as ground for abatement, see ABATEMENT AND REVIVAL, 2-5.
Misnomer of appellant in brief, see APPEAL AND ERROR, 20.
Right of assignee to sue, see ASSIGNMENTS.
Rights and liabilities as to costs, see COSTS.
Persons affected by estoppel, see ESTOPPEL.
Change of as discharging surety, see PRINCIPAL AND SURETY.
Who may purchase at tax sale, see TAXATION, 2.

1. PARTIES (2)—REAL PARTY IN INTEREST—BUSINESS NAME. In an action by B. Schmidt, a defect of parties plaintiff does not appear from the fact that the contract in suit was in the name of B. Schmidt & Co., where plaintiff was the only person interested in the company. *Schmidt v. Powell*..... 53

Partnership:

1. PARTNERSHIP (30) — ACTIONS — NECESSITY OF ACCOUNTING. One partner cannot, before dissolution of the partnership, maintain an action against his copartners to recover advances made to the partnership, such advances not being made to the other partners as individuals. *Miller v. Kemper*..... 274

2. PARTNERSHIP (55) — ACTIONS — CERTIFICATE OF ASSUMED NAME. Objections to a codefendant's maintenance of a cross-complaint upon a contract made by him in an assumed name, without the precedent filing of the certificate as to assumed names, as required by Rem. Code, § 8369, is not available to one who consented to the introduction of the certificate in evidence. *Nishimoto v. Vernon*..... 555

Payment:

Of debt secured by mortgage, see CHATTEL MORTGAGES, 6, 7.
To legatee by administrator, see EXECUTORS AND ADMINISTRATORS, 1.
Part payment to satisfy statute of frauds, see FRAUDS, STATUTE OF, 2.
Recovery of usury paid, see USURY, 1.

Pendency of Action:

As ground for abatement, see ABATEMENT AND REVIVAL, 1.

Performance:

Of contract to furnish water for irrigation, see WATERS AND WATER COURSES, 6.

Personal Injuries:

See NEGLIGENCE.
Review of verdict for, see APPEAL AND ERROR, 23.
Survival of right of action of person injured, see DEATH.
To traveler on highway, see HIGHWAYS.
Right of action and defenses, see HUSBAND AND WIFE, 3.
Right of codefendant to recover over on paying judgment for, see INDEMNITY.
To employee or third person, see MASTER AND SERVANT.
To trespasser, see RAILROADS.
Construction of verdict in action for, see TRIAL, 4.

Physicians and Surgeons:

Unlawful prescriptions for liquor, see INTOXICATING LIQUORS, 1, 4.

Place:

For examination of insured under oath, see INSURANCE, 10.

Plaintiffs:

Defect of parties plaintiff, see PARTIES.

Pleading:

Mode of raising objection of another action pending, see ABATEMENT AND REVIVAL, 1.
In action by trustee to recover debt due bankrupt, see BANKRUPTCY, 6.
For loss or injury of goods, see CARRIERS, 1.
Tender of stock before suit to enforce liability, see CORPORATIONS, 2.
Traverse of answer in garnishment, see GARNISHMENT, 2.
Indictment or criminal information or complaint, see INDICTMENT AND INFORMATION.
In action by materialman on contractor's bond, see STATES, 2.
Pleading tender, see TENDER.
In action to recover usury paid, see USURY.

1. PLEADING (6) — COMPLAINT — CONCLUSIONS. A complaint upon a written contract cannot be aided by pleading an interpretation of it contrary to the legal effect of the agreement. *Miller v. Kemper* 274

2. PLEADING (50, 56)—DENIALS—SUFFICIENCY—ADMISSIONS. The general issue as to the contents of a trunk is presented in an action to recover for a lost trunk and contents, alleged to have been delivered to the initial carrier by a hotel as agent of the plaintiffs, where the answer admitted the delivery and transportation of one trunk

Pleading—Continued.

consigned by the hotel to the plaintiffs, and denied all other allegations of the complaint describing the trunk and its contents; nor does a cross-complaint for a balance due on transportation charges on the trunk "referred to in plaintiffs' complaint," admit the allegations descriptive of the trunk and its contents. *Johnson v. Western Express Co.* 339

3. PLEADING (190)—VARIANCE—ITEMS OF DAMAGE. Where a complaint for overflowing farm lands specifically alleges with great particularity the various items of damages claimed, it is not error to exclude evidence of damage by the deposit of sand and gravel on the land, to which the complaint made no reference, in the absence of a request for leave to amend. *Anderson v. Rucker Brothers*.. 595

4. PLEADING (192, 196, 202)—WAIVER OF OBJECTIONS—TRIAL WITHOUT REPLY. The failure to deny an answer alleging contributory negligence is waived where the case was tried out on the merits as if issue had been duly joined without any timely objection. *Allen v. Schultz* 393

Policy:

Of insurance, see INSURANCE.

Port Commissioners:

Salary, increase during term, see OFFICERS, 2.

Possession:

By mortgagee and right to recover property wrongfully taken and withheld, see CHATTEL MORTGAGES, 2.

By mortgagor of stock of goods, with power to sell in course of trade, see CHATTEL MORTGAGES, 3.

Unlawful possession of liquor, sufficiency of evidence, see INTOXICATING LIQUORS, 3, 5.

Powers:

Of state bank examiner in administering affairs of insolvent bank, see BANKS AND BANKING.

Of court in habeas corpus to secure release of delinquent child, see INFANTS, 2.

Of agent, see INSURANCE, 1-3.

Of board to employ special counsel, see SCHOOLS AND SCHOOL DISTRICTS, 1.

Practice:

See APPEAL AND ERROR; COSTS; CRIMINAL LAW; GARNISHMENT; NEW TRIAL; PROHIBITION.

Preferences:

Right of state to claim preference on assets of insolvent bank in hands of bank examiner, see BANKS AND BANKING.

By insolvent corporation, see CORPORATIONS, 1.

Prejudice:

Ground for reversal in criminal prosecution, see CRIMINAL LAW, 6.
As affecting right to claim estoppel, see ESTOPPEL.

Prescription:

See WATERS AND WATER COURSES, 1.
Unlawful prescriptions for liquor, see INTOXICATING LIQUORS, 1, 4.

Presentment:

Of claim against estate of decedent, see EXECUTORS AND ADMINISTRATORS, 6-9.

Presumptions:

See EVIDENCE, 3.
As to time of interlineation in deed, see ALTERATION OF INSTRUMENTS, 1.
On appeal, see APPEAL AND ERROR, 16.

Prima Facie Case:

As shifting burden of proof, see EVIDENCE, 4.

Principal and Agent:

Representation of corporation by agent, see CORPORATIONS, 3.
Fraud of agent orally employed to purchase land, as affected by statute of frauds, see FRAUDS, STATUTE OF, 1.
Agency contract guaranteeing credits extended on sale of goods, see GUARANTY.
Insurance agents, see INSURANCE, 1-4.
Master's liability for wrongful acts or commissions of servants, see MASTER AND SERVANT, 7-9.

1. PRINCIPAL AND AGENT (15, 17)—MUTUAL RIGHTS—PROFITS MADE BY AGENT—FRAUD—EVIDENCE—SUFFICIENCY. Where a trade of lands was made by a woman with one who had acted as her local rental agent, the agent having purchased a tract for $875 for the purpose of trading it to her at a valuation of $4,000, the agent is not liable to account to her for his profits on the ground that he had violated a confidence reposed in him, where it appears that each party was in business for profit, and the agent was not trusted, but the principal acted upon the advice of her own investigator and did not at the trial question the agent's valuation of the land she had received. *Cogshall v. Jones*..... 140

Principal and Surety:

See INDEMNITY.
Contracts of guaranty, see GUARANTY.

1. PRINCIPAL AND SURETY (26)—DISCHARGE OF SURETY—CHANGE IN PARTIES TO OBLIGATION—SURRENDER OF LEASE. The sureties upon the bond of a lessee, obligated with their principal to perform the terms

Principal and Surety—Continued.

of a sublease of part of the leased premises, are not released by the fact that the lessee surrendered its lease and that the sublessee subsequently remained in possession and paid rent to the successors in interest without complaint until ejected; but are holden under the terms of the bond to maintain the sublessee in quiet and peaceful possession of the property. *Brewster Cigar Co. v. Atwood* 639

Priorities:

Of claims of state against insolvent bank, see STATES, 1.

Privilege:

From liability for slander, see LIBEL AND SLANDER, 2, 6.

Probable Cause:

For prosecution, see MALICIOUS PROSECUTION.

Probate:

Construction of probate code, see STATUTES, 9.

Process:

Defects in process as grounds for vacating judgment, see JUDGMENT, 1.

Profits:

Liability of agent for profits made on trade of lands, see PRINCIPAL AND AGENT.

Accounting by cotenant for profits, see TENANCY IN COMMON.

Prohibition:

Ratification of prohibition amendment to Federal constitution, see STATUTES.

1. PROHIBITION (39) — REVIEW — ERRORS AND IRREGULARITIES. Upon application for a writ of prohibition to prevent the discharge of a vessel by substituting a bond in lieu thereof for the protection of lien claimants, the supreme court will not consider errors of the trial court in fixing the amount of the bond or other security for the payment of claims or receiver's and attorney's fees and disbursement, since they are merely errors occurring in the exercise of jurisdiction that may be corrected by appeal. *State ex rel. Eureka Cedar Lumber & Shingle Co. v. Superior Court*..... 620

Promissory Notes:

See BILLS AND NOTES.

Proof:

Of loss insured against, see INSURANCE, 9, 10.

Property:

Mortgages on personal property, see CHATTEL MORTGAGES.
Division of on divorce, see DIVORCE, 5, 6.
Taking for public use, see EMINENT DOMAIN.
Subject to execution, see EXECUTION.
Subject to garnishment, see GARNISHMENT, 1.
Separate or community nature of, see HUSBAND AND WIFE.
Damages for removal of lateral support, see MUNICIPAL CORPORATIONS, 2, 3.

Proximate Cause:

Of injury tc person in city street, see MUNICIPAL CORPORATIONS, 8.
Of injury, see NEGLIGENCE, 2.

Publication:

Of libel, see LIBEL AND SLANDER, 1.

Public Improvements:

By cities, see MUNICIPAL CORPORATIONS, 2, 3.

Public Lands:

Judicial notice of geographical facts and surveys, see EVIDENCE, 1.

Public Policy:

Purchase of tax certificates by county treasurer as against public policy, see TAXATION, 2.

Public Service Commission:

Regulation of gas rates, see GAS.

Public Use:

Taking property for public use, see EMINENT DOMAIN.

Punishment:

Increased punishment for subsequent convictions under prohibition act, see CRIMINAL LAW, 4, 7.
Validity of act authorizing increased punishment on subsequent conviction, see INTOXICATING LIQUORS, 2.

Quarantine:

Of attorney, as excuse for delay in filing statement of facts, see APPEAL AND ERROR, 17.

Quashing:

Garnishment, see GARNISHMENT, 3.

Question for Jury:

Placing lights and barriers to guard obstruction in highway, see HIGHWAYS.

Question for Jury—Continued.

Failure of insured, without reasonable excuse, to appear for examination under oath, see INSURANCE, 9.

Malice in uttering libel, see LIBEL AND SLANDER, 2.

Disclosure of facts by defendant to prosecuting attorney, see MALICIOUS PROSECUTION.

Assumption of risk by servant, see MASTER AND SERVANT, 2, 3.

Contributing cause of injury to person on street, see MUNICIPAL CORPORATIONS, 9.

In civil actions in general, see TRIAL, 3.

Railroads:

Collision with auto at crossing, see BAILMENT.

Carriage of goods, see CARRIERS.

Assessment of right of way for benefits from drainage ditch, see DRAINS.

Injuries to employees, see MASTER AND SERVANT, 1, 2.

Contributory negligence of driver of auto at crossing as imputed to employer, see NEGLIGENCE, 3.

1. RAILROADS (53) — INJURY TO TRESPASSING BOY ON CARS — NEGLIGENCE. It is not negligence for a railroad company to fail to detect a trespassing boy boarding a car in an unfenced switch yard frequented by children, where his presence was not known to the train crew and efforts had been made by way of warning and arrests to deter this form of trespass. *Delbosco v. Northern Pac. R. Co.*.. 216

2. SAME (56)—INJURIES TO TRESPASSERS—ISSUES, PROOF AND VARIANCE. Under a complaint for injuries, sustained by a boy of nine trespassing by boarding a train in an unfenced switch yard, alleging negligence in failing to warn or object to children on its right of way and in starting the train after seeing the boy take hold of a car to board it, it is error to admit evidence of the violation of a city ordinance requiring the defendant to fence its yards. *Delbosco v. Northern Pac. R. Co.*..... 216

Rates:

Regulation of rates charged by gas company, see GAS.

Of interest, see INTEREST.

Ratification:

Of acts of agent of benefit society, see INSURANCE, 13.

Of prohibition amendment to Federal constitution, see STATUTES, 1-3.

Real Property:

Effect of statute of frauds on agreement relating to real property, see FRAUDS, STATUTE OF, 1.

Conveyance, see VENDOR AND PURCHASER.

Recall:

Of remittitur on appeal, see APPEAL AND ERROR, 27.

Receivers:

Appealability of order refusing to appoint, see APPEAL AND ERROR, 3.
Of banks, see BANKS AND BANKING.
Of corporations in general, see CORPORATIONS, 4, 5.

1. RECEIVERS (18) — APPOINTMENT — NOTICE — NECESSITY. The appointment of a permanent receiver for an insolvent corporation without notice is without justification and void, whether appointed prior or subsequent to judgment. *Gordon v. Hillman*..... 628

2. SAME (18)—NOTICE—SUFFICIENCY. The service of a writ of garnishment upon a corporation does not dispense with or take the place of notice of application for the appointment of a receiver of the corporation, after judgment against it. *Gordon v. Hillman*.. 628

Records:

Transcript on appeal or writ of error, see APPEAL AND ERROR, 14-19.

Referendum:

On legislative action approving amendment to Federal constitution, see STATUTES, 1, 3.

Reformation of Instruments:

1. REFORMATION OF INSTRUMENTS (4)—GROUNDS—MISTAKE. Where, in an exchange of properties, plaintiff's deed, by inadvertence and mistake, included property that did not belong to her, she is entitled to have the deed reformed. *Cogshall v. Jones*..... 140

Regulation:

Of charges by gas company, see GAS.

Reinstatement:

Of member of benefit society, see INSURANCE, 12, 13.

Release:

Liability as surety, see PRINCIPAL AND SURETY.

Remittitur:

Recall of, see APPEAL AND ERROR, 27.

Removal:

Of lateral support by regrade of street, see MUNICIPAL CORPORATIONS, 2, 3.

Rent:

Cost of building as basis for rent charged, see LANDLORD AND TENANT, 1, 2.
Liability of cotenant to account for rents and profits, see TENANCY IN COMMON.

Reopening Case:

For further evidence, see TRIAL, 1.

Replevin:

Presumption as to demand, in aid of judgment of, see APPEAL AND ERROR, 16.

By mortgagee entitled to possession of property, see CHATTEL MORTGAGES, 2.

Keeping tender good by deposit in court, see TENDER.

Representation:

Representation of corporations by officers or agents, see CORPORATIONS, 3.

Requests:

Review as dependent on exception to refusal to give instruction, see APPEAL AND ERROR, 7.

Rescission:

Cancellation of written instrument, see CANCELLATION OF INSTRUMENTS.

Res Judicata:

See JUDGMENT, 2, 3.

Former decision as law of the case on subsequent appeal, see APPEAL AND ERROR, 26.

Bar of action by former judgment, see DIVORCE, 3.

Conclusiveness on indemnitor of former adjudication against indemnitee, see INDEMNITY.

Resolutions:

Of legislature ratifying prohibition amendment to Federal constitution, see STATUTES, 1, 2.

Retrospective Laws:

See STATUTES, 7, 10, 11.

Revenue:

See TAXATION.

Review:

In civil action, see APPEAL AND ERROR.

In criminal prosecution, see CRIMINAL LAW, 6.

From award of damages by industrial insurance commission, see MASTER AND SERVANT, 5, 6.

Revival:

Of action, see ABATEMENT AND REVIVAL.

Right of Way:

Easements, see EASEMENTS.

Risks:

Under insurance policy, see INSURANCE, 8, 11.
Assumed by employee, see MASTER AND SERVANT, 2, 3.

Roads:

Condemnation of city property for county road, see EMINENT DOMAIN, 2, 3.
Streets in cities, see MUNICIPAL CORPORATIONS, 4-9.

Salary:

Increase of salary of officer during term, see MUNICIPAL CORPORATIONS, 1; OFFICERS, 2.

Sales:

Mortgage foreclosure sales as constituting fraudulent transfer, see BANKRUPTCY, 1-5.
Of corporate stock, see CORPORATIONS, 1, 2.
To administrator in individual capacity, see EXECUTORS AND ADMINISTRATORS, 2.
By executor or administrator, see EXECUTORS AND ADMINISTRATORS, 3, 4.
Requirements of statute of frauds, see FRAUDS, STATUTE OF, 2.
Under agency contract guaranteeing credits extended on sale of goods, see GUARANTY.
Tax sales, see TAXATION, 1, 2.
Of real property, see VENDOR AND PURCHASER.

1. SALES (10, 12)—OFFER AND ACCEPTANCE—CERTAINTY—CONTRACTS BY CORRESPONDENCE. Where the seller answered an inquiry of buyer wanting star shingles at $2 per thousand, by saying that it had sold out all its star shingles, but "quote two fifteen additional business," the expression is too uncertain to be the basis for a binding contract. *Chinook Lumber & Shingle Co. v. McLane Lumber & Shingle Co.* 587

2. SAME (10, 12). Where the seller answered an inquiry of buyer wanting five car loads of star shingles at $2 per thousand by saying that it had sold out all its star shingles, but "quote two fifteen additional business," to which the buyer replied asking seller to book it for five cars at $2.15 per thousand, and "advise by return wire how soon can ship," to which no reply was made, there was no agreement as to the number of cars or time or place of shipment, and no closed contract. *Chinook Lumber & Shingle Co. v. McLane Lumber & Shingle Co.* 587

3. SALES (154)—DAMAGES (70)—DELAY. Damages for delay in performing a contract to deliver piles at a certain time, time being of the essence of the contract, do not include, as within the reasonable and natural consequences of the delay, damages from con-

Sales—Continued.

ditions in Alaska not called to plaintiff's attention, but will be confined to demurrage paid the railway company on waiting cars and to the damages caused by the detention of defendant's scow at the loading point for lack of piles to load; there being no information to plaintiff that any further loss would be caused by the delay. *Dickey v. Alaska Pacific Fisheries*..... 633

Schedule:

Of awards by industrial insurance commission, see MASTER AND SERVANT, 5, 6.

Schools and School Districts:

1. SCHOOLS AND SCHOOL DISTRICTS (25-1)—POWERS OF BOARD—EMPLOYMENT OF COUNSEL. Rem. Code, § 4423, granting broad corporate powers to school districts, includes the right to employ special counsel, where the prosecuting attorney could not properly represent antagonistic interests of the several districts involved and urgent necessity existed for special assistance; notwithstanding Rem. Code, § 116, makes the prosecuting attorney the legal adviser of all school districts. *State ex rel. Dysart v. Gage*..... 282

2. SCHOOLS AND SCHOOL DISTRICTS (35) — BONDS — NOTICE OF ELECTION—SUFFICIENCY. The requirement of Rem. Code, § 4667, as to published notice of school elections is but directory, and notwithstanding notice was published only two days instead of three, it will not invalidate an election, where it appears from the publicity given it that the voters had ample notice and the result of the election was not affected. *Lee v. Bellingham School District No. 301*..... 482

Seals:

Necessity of notarial seal upon certificate to affidavit of good faith, see CHATTEL MORTGAGES, 1.

Sentence:

In criminal prosecutions, see CRIMINAL LAW, 7.

Separate Estate:

Of married women, see HUSBAND AND WIFE, 2, 4.

Settlement:

By executor or administrator, see EXECUTORS AND ADMINISTRATORS, 1, 5, 9, 11.

Sheriffs and Constables:

1. SHERIFFS AND CONSTABLES (36)—WRONGFUL KILLING—ACTION ON BOND—EVIDENCE—SUFFICIENCY. In an action on a sheriff's official bond for the wrongful death of a person shot by a deputy sheriff in attempting to make an arrest, evidence warranting a finding that deceased met his death from a shot from the deputy's revolver

Sheriffs and Constables—Continued.

under circumstances affording no justification, makes a question for the jury, notwithstanding that it was directly opposed to defendant's evidence. *Coldeen v. Reid*..... 508

2. SAME (36)—WRONGFUL DEATH—EVIDENCE—ADMISSIBILITY. In an action on a sheriff's official bond for the wrongful death of a person shot by a deputy sheriff in attempting to make an arrest, defendants are entitled to show the officer's belief that deceased was committing a felony, where there were sufficient facts to make it a question for the jury whether or not the officer had reasonable ground to believe that the deceased was in the act of committing a felony. *Coldeen v. Reid* 508

Shifting:

Burden of proof, see EVIDENCE, 4; MASTER AND SERVANT, 8.

Shipping:

See MARITIME LIENS.
Marine insurance, see INSURANCE, 1-4.

Signals:

Duty of master to give, see MASTER AND SERVANT, 1, 2.

Slander:

See LIBEL AND SLANDER.
Liability for slander uttered by agent, see CORPORATIONS, 3.

Specific Performance:

Action for, whether legal or equitable, see ACTION.

1. SPECIFIC PERFORMANCE (5)—DEFENSES—FAILURE OF TITLE. An agreement by a defendant, a mortgagor, to purchase a certificate of sale on the foreclosure of a second mortgage, bid in for his benefit by plaintiff, is not excused by the foreclosure of the first mortgage, since such loss was defendant's fault in failing to discharge his own obligation to pay the same. *Lindholm v. Patrick*..... 243

2. SPECIFIC PERFORMANCE (31-1) — CONDITION PRECEDENT — TENDER. Where a tender of performance was made and absolutely refused, the continuance of the tender is not a prerequisite to the maintenance of an action for specific performance of the contract on the part of the defendant. *Lindholm v. Patrick*..... 243

3. SPECIFIC PERFORMANCE (47)—DEMAND AND REFUSAL—EVIDENCE—SUFFICIENCY. In an action for specific performance of a contract whereby defendant agreed to purchase a certificate of sale of property to be bid in for his benefit, plaintiff sustained the burden of proof as to demand and refusal to perform, where the evidence showed a specific demand by an attorney and readiness on plaintiff's

Specific Performance—Continued.

part to perform and defendant's refusal, the land having in the meantime been sold on the foreclosure of a prior mortgage. *Lindholm v. Patrick* 243

Spoliation:

Of deed, see ALTERATION OF INSTRUMENTS, 1.

State Bank Examiner:

Powers of in administering affairs of insolvent bank, see BANKS AND BANKING.

Management of insolvent banks, see STATES, 1.

Statement:

Of case or facts for purpose of review, see APPEAL AND ERROR, 14-18.

Of claim against decedent's estate, see EXECUTORS AND ADMINISTRATORS, 8.

States:

Right to claim preference on assets of insolvent bank in hands of bank examiner, see BANKS AND BANKING.

Ratification of proposed amendment to Federal constitution, see STATUTES, 1-4.

1. STATES—PRIORITY OF STATE AS CREDITOR—WAIVER—LIQUIDATION BY BANK EXAMINER—STATUTES. Any right to a preference in the payment of claims against an insolvent bank which the state may have by virtue of its sovereignty or the common law of England is lost, where no claim therefor was made by the state prior to the time when the state bank examiner took charge under Rem. Code, §§ 3303-1 to 3303-19, which abolishes receivership and places the administration of insolvent banks in the hands of the state bank examiner; especially in view of the fact that the law authorizing the deposit of state funds in banks makes no provision for a preference by the state. *Aetna Casualty & Surety Co. v. Moore*..... 99

2. STATES (20-1) — CONTRACTOR'S BONDS—MATERIALMEN—COMPLAINT. A complaint by a materialman upon a contractor's bond on state work is sufficient where it alleges that the materials were furnished and delivered by plaintiff for and were used in the erection of the building. *Holly-Mason Hardware Co. v. National Surety Co*.... 74

3. SAME (20-1)—CONTRACTOR'S BONDS—CLAIMS—NONLIENABLE ITEMS. The inclusion of nonlienable items in a materialman's notice and claim against the bond of a contractor on state work is not fatal, where they were inserted by mistake and were inconsiderable in amount and easily separable. *Holly-Mason Hardware Co. v. National Surety Co.* 74

4. SAME (20-1)—CONTRACTOR'S BONDS — MATERIALS — DELIVERY—EVIDENCE. Under Rem. Code, §§ 1159-1161-1, giving materialmen a right

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of action upon the bonds of contractors on public work for materials furnished or provisions supplied in carrying on the work, it must be shown that the materials were either furnished on the ground or actually used in the construction; hence an action must fail as to items delivered through a common carrier to a station over two miles from the work, unless it be shown that they were actually delivered on the ground or used in the building. *Holly-Mason Hardware Co. v. National Surety Co*..... 74

Statutes:

See FRAUDS, STATUTE OF; INTOXICATING LIQUORS, 1, 2.

Construction of statute relating to survival of actions, see ABATEMENT AND REVIVAL, 3.

Authorizing deposit of cash in lieu of bail, see BAIL.

Construction of, see CONSTITUTIONAL LAW, 3.

Action for wrongful death, see DEATH.

Charging offense in language of statute, see INDICTMENT AND INFORMATION, 2.

Compensation of officers, see MUNICIPAL CORPORATIONS, 1; OFFICERS, 2.

Administration of insolvent banks, see STATES, 1.

Inheritance taxes, see TAXATION, 3.

1. STATUTES (2-3)—INITIATIVE AND REFERENDUM—WHAT LAWS SUBJECT TO—"ACT, BILL OR LAW"—APPROVING AMENDMENT TO FEDERAL CONSTITUTION. The joint resolution of the legislature ratifying the prohibition amendment to the Federal constitution is subject to referendum, being an "act, bill or law" within the meaning of the seventh amendment of the constitution, art. 2, § 1, adopting the referendum form of government. *State ex rel. Mullen v. Howell* 167

2. SAME (2-3). The authority for state action on a proposed amendment to the Federal constitution is found in the Federal and not the state constitution, and the power to question it being in Congress and not in the courts, the contention that the legislature had no power to act by resolution is nonjusticiable. *State ex rel. Mullen v. Howell* 167

3. SAME (2-3). Article 5 of the Federal constitution, providing that a proposed amendment shall be valid when ratified by the legislatures of three-fourths of the states, means that the ratification shall be by the legislative power of the state, which, under the reserved power of referendum, includes the whole people as part of the law making power, and renders legislative action on a proposed amendment subject to a referendum. *State ex rel. Mullen v. Howell*.. 167

4. SAME (2-3). The adoption of the referendum form of government does not violate the Federal constitution, art. 4, § 4, guaranteeing to every state a republican form of government. *State ex rel. Mullen v. Howell* 167

Statutes—Continued.

5. STATUTES (9)—PARTIAL INVALIDITY. The invalidity of the provision in Laws 1919, p. 566, creating the industrial code commission, that two of its five members must be members of the legislature, does not affect the validity of the balance of the act or prevent the Governor from appointing some other citizens who are eligible. *State ex rel. French v. Clausen*..... 667

6. STATUTES (35-1) — AMENDMENTS — TITLE — SUBJECT. The title to chapter 152, Laws of 1917, p. 616, relating to assessments and bonds of commercial waterway districts is sufficient, under Const., art. 2, § 37, providing that no act shall be amended by mere reference to its title and requiring the amendment to set forth the act amended at full length. *Behrens v. Commercial Waterway District No. 1*... 155

7. STATUTES (68)—LEGISLATIVE CONSTRUCTION—RETROACTIVE EFFECT. An intent to make retroactive a divorce statute (Laws 1917, p. 353) authorizing a divorce where the parties are estranged and have lived separate and apart for eight years or more, is not shown by the fact that the legislature rejected an amendment inserting "after the year 1917." *Pierce v. Pierce*..... 125

8. STATUTES (74)—CONSTRUCTION—EXCEPTIONS. The seventh amendment, art. 2, § 1, of the constitution, which reserves to the people a right to a referendum of all laws except such as are necessary for the immediate preservation of the public peace, health, or safety or support of public institutions, is an expression of a reservation to pass upon all things not specified in the exception. *State ex rel. Mullen v. Howell*..... 167

9. STATUTES (75)—CONSTRUCTION—CODES. The Law of 1917, p. 642, designated as "Probate Code" being a complete and comprehensive act on the subject-matter of its title, its sections are *in pari materia*, and must be harmonized and construed together. *First Security & Loan Co. v. Englehart*..... 86

10. STATUTES (86)—RETROACTIVE OPERATION—DIVORCE STATUTES. Laws 1917, p. 353, authorizing a divorce where the parties are estranged and have lived separate and apart for eight years or more, must be given a prospective operation, and does not apply to estrangements which existed prior to the passage of the act. *Pierce v. Pierce*.. 125

11. STATUTES (86, 91)—CONSTRUCTION—RETROACTIVE OPERATION—REMEDIES. A prior action at law to establish existing water rights, is not affected by the water code, Laws 1917, p. 47, § 1, which saved all existing rights of the state and provided that nothing therein shall affect existing rights of any riparian owner. *Pate v. Peterson*..... 93

Stipulations:

By counsel as to bill of exceptions or statement of facts, effect of, see APPEAL AND ERROR, 15.

Stock:

Corporate stock, see CORPORATIONS, 1, 2.

Stockholders:

Of corporations, see CORPORATIONS, 1, 2.

Streets:

See MUNICIPAL CORPORATIONS, 4-9.
Condemnation of city property for county road, see EMINENT DOMAIN, 2, 3.

Striking:

Answer, appealability of order, see APPEAL AND ERROR, 1.
Of brief for misnomer of appellant, see APPEAL AND ERROR, 20.
Cost bill on appeal, see COSTS, 3.

Subscriptions:

To corporate stock, see CORPORATIONS, 1, 2.

Substitution:

Of bond on release of property, see MARITIME LIENS.

Suit Money:

Allowance on divorce, see DIVORCE, 4.

Supersedeas:

On appeal or writ of error, see APPEAL AND ERROR, 13.

Suretyship:

See PRINCIPAL AND SURETY.

Surrender:

Of lease as discharge of surety on bond of lessee, see PRINCIPAL AND SURETY.

Surveys:

Judicial notice of government surveys, see EVIDENCE, 1.

Survival:

Of cause of action, see ABATEMENT AND REVIVAL, 2-4.

Taxation:

Assessment for drains, see DRAINS.
Assessment for benefits from local improvement, see EMINENT DOMAIN, 4.

1. TAXATION (140) — SALE — NOTICE — "RECORD" OWNER. Notwithstanding a tax certificate foreclosure may be maintained against the owner named on the tax rolls, the county treasurer must, by the express provision of Rem. Code, § 9260, notify the "record owner"

Taxation—Continued.

of the property of the pending sale; "record owner" being employed in its usual and common meaning. *Okanogan Power & Irrigation Co. v. Quackenbush* 651

2. TAXATION (142) — SALE — WHO MAY PURCHASE — CERTIFICATES OF DELINQUENCY. Under Rem. Code, § 2334, making it a misdemeanor for any public officer to be beneficially interested in any contract or purchase made by him, it is against public policy for a county treasurer, while in office, to purchase tax certificates of delinquency to be issued by his office; and a tax foreclosure thereon will be set aside, notwithstanding final steps to procure title were not taken until after his term of office had expired. *Okanogan Power & Irrigation Co. v. Quackenbush* 651

3. TAXATION (225-229)—INHERITANCE TAXES — COMPUTATION — STATUTES. The inheritance tax law, Rem. Code, § 9182, and § 9183, as amended by Laws 1917, p. 196, making classifications which require the relationship of each legatee to be considered in order to determine the rate, was intended to tax the right to receive by inheritance as distinguished from a tax upon the property or the right to transmit it; hence each legacy must be considered as a separate entity and taxed as such at the statutory rate. *In re Corbin's Estate* 424

Taxation of Costs:

See COSTS, 3.

Tenancy in Common:

1. TENANCY IN COMMON (7)—RENTS AND PROFITS. In an action for an accounting of profits received by a tenant in common who farmed the land, rentals should be based upon one-third of the crop, where that was the custom in that country for lands of that kind. *Womach v. Sandygren* 80

2. SAME (7). In an action for an accounting of profits received by a tenant in common who farmed the land, he should be required to account for a crop at the price at which it was actually sold. *Womach v. Sandygren* 80

3. TENANCY IN COMMON (7, 11-1)—RENTS AND PROFITS—ACCOUNTING. Where one tenant in common farmed parts of the land, claiming it as her own, excluding her cotenants and refusing to pay any part of the proceeds, she is liable to an accounting for the profits. *Womach v. Sandygren* 80

4. SAME (8)—REPAIRS AND IMPROVEMENTS. Pending receivership litigation for the partition of common property, a tenant in common makes repairs and improvements at her peril, and cannot offset the same against an action for profits, where they did not enhance the value of the property. *Womach v. Sandygren* 80

Tender:

Pleading tender of stock before suit to enforce liability, see CORPORATIONS, 2.

Of performance as condition precedent to action, see SPECIFIC PERFORMANCE, 2.

1. TENDER (10)—KEEPING TENDER GOOD. In an action at law under the claim and delivery statute for a balance due or return of property conditionally, sold, the plea and defense of tender before suit is bad unless the tender is kept good by bringing the money into court. *Union Machinery & Supply Co. v. Thompson*..... 630

Time:

Of alteration of instruments, see ALTERATION OF INSTRUMENTS, 1.

For taking appeal, see APPEAL AND ERROR, 10-12.

For filing proposed statement of facts, see APPEAL AND ERROR, 17-19.

For filing cost bill, see COSTS, 3.

For presentation of claims against decedent's estate, see EXECUTORS AND ADMINISTRATORS, 6-9.

To sue for unlawful detainer of demised premises, see LANDLORD AND TENANT, 6.

Title:

Effect on, of interlineation in deed, see ALTERATION OF INSTRUMENTS.

Estoppel to assert title, see ESTOPPEL.

Failure of title as defense to specific performance, see SPECIFIC PERFORMANCE, 1.

Of statutes, see STATUTES, 6.

Torts:

See LIBEL AND SLANDER; MALICIOUS PROSECUTION; NEGLIGENCE.

Assignability of right of action for tort, see ASSIGNMENTS.

By corporate officers, see CORPORATIONS, 3.

Causing death, see DEATH.

Injuries caused by defects or obstructions in road, see HIGHWAYS.

Of employers, see MASTER AND SERVANT, 1-6.

Injuries by employees, see MASTER AND SERVANT, 7-9.

Agents, see PRINCIPAL AND AGENT.

Negligent operation of railroads, see RAILROADS.

Towns:

Judicial notice of location of, see EVIDENCE, 2.

Transcripts:

Of record for purpose of review, see APPEAL AND ERROR, 14-19.

Dismissal of appeal for failure to file, see APPEAL AND ERROR, 19.

Transfer:

Of corporate shares, see CORPORATIONS, 1, 2.

Trespass:

Injuries to trespassers, see RAILROADS.

Trial:

Review of ruling as dependent on presentation of objection or exception in lower court, see APPEAL AND ERROR, 5-9.
Review of rulings as dependent on presentation of same by record, see APPEAL AND ERROR, 14-19.
Review of findings in trial by court, see APPEAL AND ERROR, 25.
Continuance in civil actions, see CONTINUANCE.
In criminal prosecutions, see CRIMINAL LAW.
Instructions in condemnation proceeding, see EMINENT DOMAIN, 6.
Instructions in action on insurance policies, see INSURANCE, 11.
Instructions in action for slander, see LIBEL AND SLANDER, 6.
Instructions in action for injury to person struck by auto in city street, see MUNICIPAL CORPORATIONS, 5, 8.
Motions and grounds for new trial, see NEW TRIAL.
Instructions in action for flooding lands by negligent construction of dam, see WATERS AND WATER COURSES, 3-5.
Examination of witnesses, see WITNESSES.

1. TRIAL (31, 32)—REOPENING CASE. In an action for injuries sustained in driving under an elevated pipe where there was not sufficient clearance, it is not an abuse of discretion to refuse to open the case for further evidence and continue the hearing to show the height of the pipe. *Simpson v. Brown*..... 366
2. TRIAL (42-1, 43) — MISCONDUCT OF COUNSEL — SHOWING INDEMNITY INSURANCE. Upon the trial of a cause for wrongful death, plaintiff's counsel should not be permitted, in examining the jurors on their *voir dire*, to persistently so interrogate them as to suggest that an indemnity bonding company was interested in the defense of the action. *Schwalen v. Fuller & Co*..... 476
3. TRIAL (55-2) — TAKING CASE FROM JURY — PARTICULAR ISSUES. Where no evidence is given to support an affirmative defense, it should be withdrawn from the consideration of the jury. *Blomskog, Erickson & Cotton v. Seattle*..... 471
4. TRIAL (134, 143)—VERDICT—CONSTRUCTION AND OPERATION. In an action for personal injuries received when an employee, pursuant to a command, removed a halter from a vicious cow, a general verdict for plaintiff, together with a special finding that he was injured as he claims, amounts to a finding that he removed the halter pursuant to orders. *Walters v. Sievers*..... 221

Trover and Conversion:

Assignment of right of action for conversion, see ASSIGNMENTS.

Trustees:

Trustees in bankruptcy, see BANKRUPTCY, 1, 2, 5, 6.
Action by to enforce stockholders' liability, see CORPORATIONS, 2.

Trusts:

On real property in hands of agent, as affected by statute of frauds, see FRAUDS, STATUTE OF, 1.

Unlawful Detainer:

See LANDLORD AND TENANT, 5, 6.

Usury:

1. USURY (13) — RECOVERY OF USURY PAID — EFFECT OF PAYMENT. A mortgagor who deeds the mortgaged property in satisfaction of a usurious mortgage note is not estopped, by making such payment, from maintaining an action to recover the usurious interest exacted. *Hopgood v. Miller*..... 449

2. SAME (14, 17)—VALUE OF PROPERTY TAKEN—PLEADING AND PROOF. In an action to recover usurious interest exacted, after plaintiff deeded property to the defendant in satisfaction of the amount demanded, $5,211.60, an answer denying that the property was worth any sum in excess of $5,000, admits it was of that value; and it having been taken in satisfaction of the demand for $5,211.60, such sum must be assumed to be the value of the property at that time. *Hopgood v. Miller*..... 449

Vacation:

Of order approving final account, see EXECUTORS AND ADMINISTRATORS, 10.
Of garnishment, see GARNISHMENT, 3.
Of default judgment, see JUDGMENT, 1.
Tax sale, see TAXATION, 2.

Value:

Of land appropriated for public use as measure of compensation, see EMINENT DOMAIN, 5-8.
Of property insured, see INSURANCE, 8, 11.

Variance:

Between pleading and proof in civil actions, see PLEADING, 3.
In action for injury to trespassing boy on cars, see RAILROADS, 2.

Vendor and Purchaser:

Implied right of way on sale of part of tract of land, see EASEMENTS.
Sale of realty by executor or administrator, see EXECUTORS AND ADMINISTRATORS, 3, 4.
Transfers of ownership of personal property, see SALES.

1. VENDOR AND PURCHASER (5, 6) — REQUISITES — OFFER TO SELL OR PURCHASE—ACCEPTANCE VARYING FROM OFFER. Though an agent was authorized by wire to accept a deposit on a proposed sale of lands, the minds of the parties did not meet and there was no binding contract for the sale, where the agent's earnest money receipt stated

Vendor and Purchaser—Continued.

that the sale was subject to the owner's approval, and the owner declined to accept the terms proposed thereafter by which he was to pay taxes not due and accept seven per cent interest on deferred payments. *Kuh v. Lemcke*..... 45

Verdict:

Review on appeal or writ of error, see APPEAL AND ERROR, 23, 24.
Recommitment to jury, see CRIMINAL LAW, 3.
In civil actions, see TRIAL, 4.

Verification:

Of claim against estate of decedent, see EXECUTORS AND ADMINISTRATORS, 8.

Waiver:

See ESTOPPEL.
Of error on appeal, see APPEAL AND ERROR, 22.
Of default of member of benefit society, see INSURANCE, 12, 13.
Of forfeiture of coal mine lease, see MINES AND MINERALS, 3.
Of objections to capacity to sue, see PARTNERSHIP, 2.
Of objections to pleading, see PLEADING, 4.
By state of preference right in payment of claims against insolvent bank, see STATES, 1.

War:

Postponement of hearing to change custody of child, until return of parent from military service, see DIVORCE, 8.

Warning:

Duty of master to give signals of movement of train, see MASTER AND SERVANT, 1, 2.

Warranty:

In contracts of insurance, see INSURANCE, 6.

Waste:

Forfeiture of coal mine lease for waste in using coal for ballast, see MINES AND MINERALS, 3.

Waters and Water Courses:

Works for protection or improvement of lands, see DRAINS.
Assessment of benefits from commercial waterway, see NAVIGABLE WATERS.
Sufficiency of title of act relating to assessments and bonds of commercial waterway districts, see STATUTES, 6.
Retroactive operation of water code, see STATUTES, 11.

1. WATERS AND WATER COURSES (37, 59)—DIVERSION—PRESCRIPTIVE RIGHTS—USE OF DITCH FOR IRRIGATION. Plaintiff's evidence suffi-

Waters and Water Courses—Continued.

ciently establishes his prescriptive rights to the use of a ditch on adjoining lands to convey waters for irrigation, where it appears that adjoining owners of riparian lands jointly built the ditch and used the same to convey surplus waters, all doing an annual share of the work on the ditch and equally using the water according to their respective needs for a period of over twenty-four years. *Pate v. Peterson* 93

2. WATERS AND WATER COURSES (72-74)—FLOWAGE—DEGREE OF CARE. One who impounds the waters of a stream is required to exercise such reasonable care and caution in the construction, maintenance and operation of the dam as a reasonable, careful, and prudent man acquainted with the nature and habits of the stream would exercise under like circumstances, not only as to ordinary conditions but as to such unusual and extraordinary floods as such a careful man would reasonably expect; but he is not an insurer or liable for acts of God or floods that would not be anticipated by a reasonably prudent man. *Anderson v. Rucker Brothers*..... 595

3. SAME (74)—FLOWAGE—INSTRUCTIONS. In an action for overflowing farm lands by the negligent construction of a dam that gave way, instructions which as a whole required that defendant's dam must be sufficient to withstand all such freshets and floods as an ordinarily prudent person, having knowledge of the conditions, would expect to occur, are as favorable to plaintiff as he could ask. *Anderson v. Rucker Brothers*..... 595

4. SAME (74). Such instructions are sufficient notwithstanding a somewhat unfortunate use of words in referring to "unusually high freshets" which would not have been reasonably expected, where it was plain that unprecedently high freshets was meant; and notwithstanding they were subject to some criticism in not more fully expressing that the reasonably prudent person mentioned should be one who knew the country and the nature and habits of the stream; especially in the absence of any request for amplification of any indication that the jury was misled. *Anderson v. Rucker Brothers*.. 595

5. SAME (74). In such a case, the instructions are not objectionable in that they refer to such case as an ordinarily prudent man would exercise in like conditions "when the risk is his own;" since the expression did not refer to such care as would be exercised if the land were his own, but if the risk of being held in damages were his own. *Anderson v. Rucker Brothers*..... 595

6. WATERS AND WATER COURSES (98) — IRRIGATION — CONTRACT FOR WATER—PERFORMANCE. An irrigation company's contract to deliver water is not breached where it was ready to deliver the water, but the owner had failed to designate any point for delivery and had not prepared his land to receive it. *Huschke v. Arcadia Orchards Co.* 676

Waters and Water Courses—Continued.

7. SAME (102)—DAMAGES (117)—EVIDENCE—SUFFICIENCY. Damages for failure to furnish water for irrigating an orchard cannot be left to speculation and conjecture, and a verdict without definite proof cannot be sustained. *Huschke v. Arcadia Orchards Co*..... 676

Ways:

Private rights of way, see EASEMENTS; EMINENT DOMAIN, 1.

Wills:

Necessity of presenting claims against estate in case of nonintervention will, see EXECUTORS AND ADMINISTRATORS, 7.
Legacy and succession taxes, see TAXATION, 3.

Witnesses:

Absence of witnesses as ground for continuance, see CONTINUANCE.
Fees as costs, see COSTS, 1.
Opinions, see EVIDENCE, 5.

1. WITNESSES (44)—COMPETENCY—TRANSACTIONS WITH PERSON SINCE DECEASED. Evidence that a written statement given by deceased to witness had been lost, is not inadmissible as testimony of a transaction had with the deceased, where it was introduced to establish the existence of the contract. *In re Bushnell's Estate*..... 331

2. WITNESSES (45)—COMPETENCY—TRANSACTIONS WITH PERSON SINCE DECEASED. Rem. Code, § 1211, forbidding testimony as to any transaction had with a person since deceased, does not exclude evidence as to whether a deed contained an interlineation of the deceased's name as grantee at the time it was executed, the deceased not having been present at the time of the transaction. *Engstrom v. Peterson* 523

Workmen's Compensation Act:

See MASTER AND SERVANT, 5, 6.

Writings:

Requirements of statute of frauds, see FRAUDS, STATUTE OF.

Writ of Review:

Motion in supreme court, as to statement of facts, considered as application, see APPEAL AND ERROR, 18.

Writs:

See GARNISHMENT; PROHIBITION.
Supersedeas by supreme court, see APPEAL AND ERROR, 13.

Year:

Agreements not to be performed within one year, see FRAUDS, STATUTE OF, 2.

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